Supreme Court, U.S.
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NO.

In The

Supreme Court of the United States

October Term, 1997

James W. Coleman, Ph.D.
Petitioner

v.

Joseph E. Seagram & Sons, Inc.
Respondent

On Petition For Writ Of Certiorari
To The United Court of Appeals
For
The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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15 pp

1. Whether petitioner's Constitutional rights were violated as they pertain to the discovery problems connected with material facts as discussed herein.

2. Petitioner alleged that respondent's higher-level managers wrote racist statements in his promotability evaluations. He was alleged that respondent artificially crafted at least one of petitioner's promotability evaluations in a manner in anticipation of his filing a Title VII lawsuit.

Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not order enforcement of the lower court's **discovery Order** compelling the respondent to produce a copy of the remainder of petitioner's own personnel file.

3. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not order enforcement of the lower court's **discovery Orders** compelling the respondent to produce the specific job-performance evaluations on the respondent's named Caucasian employees which a magistrate judge found in the possession of the respondent and which pertain to a material fact.

4. Whether the Sixth Circuit applied the wrong law to the issue concerning abuse of discretion for lack of enforcement of lower court's **discovery Orders**.

5. Whether the Sixth Circuit abused when it did not require imposition of sanctions against respondent since a finding of fact was made that it was "knowingly" withholding material documents.

6. Counsel for the parties had signed a written agreement stating that any requested documents containing confidential business information would be filed for an In Camera inspection.

Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address the issue that respondent, prior to production, unilaterally redacted job-related documents pertaining to a material fact.

7. Whether the Sixth Circuit departed from the accepted and usual course of judicial proceedings relating to the sequence of discovery and entertaining respondent's motions for summary judgment.

8. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address the issue of the district court ruling on petitioner's discovery motions and granting respondent summary judgment all on the same day.

9. Whether the decision of the Sixth Circuit was arbitrary and capricious when it stated that the respondent moved

for summary judgment on petitioner's claims for constructive discharge and failure to promote **after** the district court had made its ultimate ruling on the discovery disputes.

10. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address the issue of the district court entertaining respondent's motion for summary judgment on petitioner's claim of constructive discharge while petitioner's supporting claims of retaliatory acts and subjection to different job performance standards were still viable.

11. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address the issue of subjection to different job-performance standards as one of the supporting claims for the constructive discharge claim.

12. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address the issue of the district court denying petitioner's motion to discover certain of respondent's written personnel policy and procedural documents covering petitioner's last two years of employment with the respondent.

13. Whether the Sixth Circuit abused its discretion when it did not address the specific issue of tolling the

statute limitations to grant leave of court to allow amending the complaint to include damages for intangible injuries, under the Kentucky Civil Rights Act, because of the nonproduction of the remainder of petitioner's own personnel file.

14. Whether the Sixth Circuit abused its discretion and/or committed clear and reversible error when it did not address of the issue the district court forcing petitioner to trial on his claims for failure to promote and retaliatory acts without the benefit of the discovery referred to in Paragraphs 2, 3, 6, and 12, above.

15. Whether petitioner was fatally prejudiced at trial because the district court, with ultimate approval by the Sixth Circuit, did not enforce its **discovery Orders**, and permit discovery of respondent's personnel documents (Paragraph 12, above).

16. The instant case is of exceptional public interest in the civil-rights community in light of the much publicized case involving Texaco.

Whether the decision of the Sixth Circuit concerning the discovery Orders is likely to have a chilling and deterring effect on nonparties who may wish to redress their grievances under Title VII.

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The Order sought to be reviewed was entered on October 31, 1996.

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JURISDICTION

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the Order in question is 28 U.S.C. ss1254(1).

STATUTORY PROVISION INVOLVED

The Civil Rights Act of 1964, 42 U.S.C. @ 2000e-2(1) provides:

> It shall be an unlawful employment practice for an an employer--to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or pivileges of employment, because of such individual's race, religion, sex, or national origin.

Section 704(a) of the Civil rights Act of 1964, 42 U.S.C. @ 2000e-3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an

> investigation, proceeding, or hearing under this subchapter.

Kentucky Revised Statute, ss344.450 provides:

> Any person deeming himself injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record, all of which shall be in addition to any other remedies contained in this chapter.

Title VII plaintiffs in Kentucky, under Ky. Rev. Stat. ss344.450, are permitted to recover damages for intangible injuries such as humiliation, embarrassment, and mental and emotional distress. Mitchell v. Seaboard Systems, Inc., 883 F.2d 451, 454 (6th Cir. 1990).

STATEMENT OF THE CASE

Petitioner James W. Coleman, proceeding pro se, is an African American who is a citizen of the United States and resides in the Commonwealth of Kentucky, and was employed by respondent Joseph E. Seagram & Sons, Inc., ("Seagram" or "company") for over 21 years. I was employed as a senior research scientist in Seagram's biotechnology section in its research and development ("R&D") department then located in Louisville, Kentucky. I have a Ph.D. degree in microbiology, the requisite degree for the job at issue. Further, I was a long-time activist in the civil-rights movement related to equal employment opportunities.

During the early part of 1984, Dr. Frederick Weber, then my immediate supervisor and head of Seagram's biotechnology section, announced his intent to retire when he reached his 62nd birthday in February 1985. On the basis of my time with the company, my academic degree, my job grade, my job performance which always had been above management's expectation, and Seagram's past practices, I thought that I was next in line to head the biotechnology section and the most logical choice for it. Based on Seagram's past practices, shortly after Dr. Weber's announced intent to retire, I would have been promoted to head the biotechnology section. Also based on Seagram's past practices, for the purposes of training and business continuity, Dr. Weber and I

would have been in the **same** section head position at the **same** time.

Based on my sworn testimony, shortly after Dr. Weber announcement about retirement, he told me that Dr. Leslie Bluhm, then Seagram's decision-maker and vice-president of the R&D department, was forcing him to craft my promotability evaluation for 1984 in a manner in anticipation of my filing a Title VII lawsuit. Further, I swore under oath that in the spring of 1985 Dr. Weber told me that Dr. Bluhm had written racist statements in my 1985 promotability evaluation related to my potential for career advancement. I also swore under oath that over the years Dr. Weber told me that other upper-level managers in the Seagram organization routinely wrote racist statements in the confidential section of my promotability evaluations after they had been shown to me. I finally swore under that I had personally seen racist statements which had been written in the nonconfidential section of my job-performance evaluation.

By March 1985 with no one offering me the position as the next head of the biotechnology section, I went through three tiers of Seagram's management in unsuccessful attempts to gain access to my complete personnel file. I was shown **copies** of a few documents but never the complete file. I also requested, in writing, permission to examine my promotability evaluations specifically. Seagram denied my request.

Dr. Weber retired at the end of July 1985. Thereafter, an employee with a high school diploma assumed the job responsibilities previously performed by Dr. Weber. In mid-August 1985, Seagram announced that Dr. Albert Bronsky, who was Caucasian, had been selected as the interim head of the biotechnology section. I then gave written notice that I would involuntarily separate from the company effective August 31, 1985, stating that I could no longer tolerate the company's unrelenting racist policies and practices which were directed at me.

After I received my "letter of right to sue" from the Equal Employment Opportunity Commission in October 1986, the instant lawsuit was instituted on January 12, 1987 in the United States District Court for the Western District of Kentucky at Louisville, Civil Action No. C-87-0022. I alleged in my sworn Complaint that Seagram (i) failed to promote me because of my black race, (ii) intentionally perpetrated retaliatory acts against me because of my opposition to the company's racist policies, procedures and practices, (iii) intentionally and continuously subjected me, because of my black race, to job-performance standards which were materially different from those applied to my Caucasian co-workers, and (iv) created, by the three elements above, a hostile and intolerable work environment which caused my constructive discharge. Pet. App. A-1.

I am also seeking to amend my original Complaint to include damages for intangible injuries for embarrassment, humiliation and mental anguish under the Kentucky Civil Rights Act, Ky. Rev. Stat. ss344.450.

In April 1988, I requested Seagram to produce, among other things, a copy of my complete personnel file. Seagram produced some documents, but none of my promotability evaluations covering my last 12 years with the company, (except only selected pages for the last two years, infra.) On November 30, 1990, a magistrate judge, proceeding pursuant to 28 U.S.C. 636(b)(1)(A), ordered Seagram, to produce copies of the remainder of my personnel file if it has or discovers any additional documents. Pet. App. A-2. On April 1991, I requested Seagram to produce, among other things, copies of specific job-performance evaluations on certain Caucasian employees, covering the period between 1965 and 1985 when these Caucasian employees worked with me in Seagram's R&D department.

In its **discovery Order** of February 3, 1993, a magistrate judge, acting pursuant to 28 U.S.C. ss636(b)(1)(A), made a finding of fact that Seagram was **"knowingly"** refusing to produce the job-performance evaluations in its possession on certain Caucasian employees. Pet. App. A-3. On or about May 24, 1993, the respondent filed its motion for summary judgment on my claims for constructive discharge and failure to promote. Record 96. On June 11, 1993, the same

magistrate judge, acting pursuant to 28 U.S.C. ss636(b)(1)(A), ordered Seagram to produce for inspection the specific job-performance evaluations on named Caucasian employees. Pet. App. A-4. At the inspection, Seagram did not produce **any** of the job-performance evaluations covered under the June 11, 1993 **discovery Order**.

On August 9, 1993, I moved the district court to impose sanctions against the respondent for not producing any job-performance evaluations covered under the **discovery Orders** of February 3, 1993 (Pet. App. A-3) and June 11, 1993 (Pet. App. A-4). On March 31, 1994, the trial court denied my motion to impose sanctions against Seagram for these nonproductions. Pet. App. A-5. Also on the same day of March 31, 1994, the trial court dismissed my claims for constructive discharge and failure to promote at the summary judgment stage. Record 117. On May 17, 1994, I moved for reconsideration on my claim for failure to promote. Record 120. On or about June 13, 1994, the respondent moved for summary judgment on my claim for retaliatory acts. Record 123.

On April 11, 1995, my claim for failure to promoted was reinstated, and respondent's summary judgment motion on my claim for retaliatory acts was denied. Record 144. With all three of the supporting elements (failure to promote, retaliatory acts, and subjection to different job performance standards) of my claim for constructive discharge now

viable, I then moved for reconsideration of the claim for constructive discharge. Record 146. The case proceeded to trial only on my claims for failure to promote and retaliatory acts which were dismissed thereafter on June 27, 1995, stating that I did not establish a prima facie case. Record 174. My motion for reconsideration of my claim for constructive discharge was denied about five minutes before trial began. Record 190. My claim for subjection to different job standards was never addressed. After all my pretrial motions were denied on December 15, 1995. My pro se notice of appeal was filed timely on January 10, 1996 to the United States Court of Appeals for the Sixth Circuit followed. Record 186. My pro se appeal was dismissed on October 31, 1996, affirming the judgment of the district court. Pet. App. A-6. My pro se petition for rehearing was denied on December 12, 1996. Pet. App. A-7. This timely pro se petition for writ of certiorari was filed by mailing on March 5, 1997.

JURISDICTION OF FIRST INSTANCE

Federal subject matter jurisdiction in the first instance exists pursuant to 28 U.S.C. ss1331.

ARGUMENT

Introduction

Section 2000e-2(a) of Title VII provides, in pertinent part:

> "It shall be an unlawful employment practice for an employer (1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race ...." 42 U.S.C. ss2000e-2(a) (1988).

Section 2000e-3(a) of Title VII provides, in pertinent part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of its employees ... because [the employee] has opposed any practice made an unlawful practice by this subchapter, or because he had made a charge, testified, assisted, or otherwise participated in any manner in an investigation, proceeding, hearing under subchapter." 42 U.S.C. ss2000-3(A) (1988).

Title VII plaintiffs in Kentucky, under Ky. Rev. Stat. ss344.450, are permitted to recover damages for intangible injuries such as humiliation, embarrassment, and mental and emotional distress. Mitchell v. Seaboard Systems, Inc., 883 F.2d 451, 454 (6th Cir. 1990).

I.

THE SIXTH CIRCUIT ABUSED ITS DISCRETION AND COMMITTED CLEAR AND REVERSIBLE ERROR WHEN IT GAVE JUDICIAL APPROVAL OF SEAGRAM'S NONCOMPLIANCE WITH THE DISCOVERY ORDERS, I.E., NOT PRODUCING ANY OF THE JOB-PERFORMANCE EVALUATIONS WHICH PERTAIN TO MATERIAL FACTS AND WHICH A MAGISTRATE JUDGE FOUND IN SEAGRAM'S POSSESSION.

Congress placed the ultimate burden of persuasion on the plaintiff to prove his or her case in a Title VII action. Even in a Title VII action involving only one plaintiff (as is true in the instant lawsuit), Congress reasoned that this was not too burdensome for a lone Title VII plaintiff because of the liberal discovery rule in any federal court, because the plaintiff may discover documents in the possession of the defendant. It also was the clear intent of Congress for the liberal discovery rule to apply to African-American plaintiffs equally. For obvious reasons, most lone Title VII plaintiffs in my shoes must rely on the documents in the possession of the employer to establish a *prima facie* case and to carry their ultimate burdens at trial. A Title VII plaintiff may discover the documents in the possession of the employer under Rule 34 of the Federal Rule of Civil Procedure.

Rule 34 provides, in pertinent part:

> Any party may serve on any other party a request (1) to produce and permit the party

> making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents ... which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

Rule 26(b) provides, in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery.

If the request is refused, a party may apply for an Order compelling discovery, Rule 37, Federal Rules of Civil Procedure. To prepare my case (on all claims) and plan my strategy of trial, I tried to discover the job-performance evaluations pertaining to my promotability and potential for career advancement. For use in a comparative analysis, I also tried to discover the promotability evaluations on certain of my Caucasian co-workers who, like me, also had a Ph.D. degree and worked in my same unit. For the same purpose, I also made attempts to discover the job-performance evaluations of certain other Caucasian employees who had only a bachelor's or master's degree and were promoted or not promoted to a section head position which was the same as or

equivalent to the section head position which I was seeking.

The undisputed facts are that Seagram used two basic types of forms to evaluate the job performance of all its employees, including me, in its R&D department in Louisville, Kentucky. One form was used to rate the employee for salary increases. A second and different form was used to rate and assess an employee's promotability and potential for career advancement. The discovery of the promotability evaluations was of particular relevance in connection with the claim for failure to promote, and to discover direct evidence of racial animus.

Seagram's promotability form which was in use during my last five years of employment with the company was titled Development Review, but has been commonly referred to by the parties throughout these proceedings as the "blue book" because it has a blue cover. The "blue book" is an eight-page, bound document. In response to my request for a copy of my personnel file, Seagram stated in writing that it was providing copies of "... certain performance evaluations of plaintiff (except for privileged documents) ...." Record 12.

After a magistrate judge's **Order** was entered compelling Seagram to produce copies of "any remaining documents" in its possession on my job-performance, Seagram has never disputed the fact that it has never produced any of my

promotability evaluations covering my last 12 years of employment with the company. These missing promotability evaluations are in Seagram's possession as evidenced by a finding of fact made by a magistrate judge that no job-performance documents have been destroyed, *infra*. Additionally, Seagram has never disputed the fact that it has never produced **first six (6) pages of my promotability evaluations (i.e., "blue books") for either 1984 or 1985**--my last two years with the company. The ultimate decision of the Sixth Circuit to allow Seagram to abuse the discovery process by withholding my promotability evaluations under a scheme of "privileged documents" is clearly erroneous, and I was fatally prejudiced by this error.

Regarding the Caucasian employees, the specific job-performance evaluations which were covered in the **discovery Order** included "'bluebook" performance appraisals, performance summary forms, supervisor notes, merit review ratings, development review and performance plan and assessment summaries, position description questionnaires, management incentive plan, letters of recommendation, and complimentary or disciplinary letters.'" Pet. App. A-4, p. 6. Seagram's Caucasian employees named in this **discovery Order** compelling production included Drs. Richard Bailey, Edward Ruf, Weldon Maisch, Albert Bronsky, Frederick Weber, James Wolfram and Ronald Wagener, and Ms. Joan Wathen and Messrs. Frank Luther, Clifford Bosworth, Jack Sanders, Tom Coffey, and

Richard Panek. *Id.* The 'findings of fact' in the **discovery Orders** read, in pertinent parts:

> First, "'[Seagram's] vice - president and custodian of personnel files, Robert Cherundolo, testified that: Whatever forms were completed, we have them .... No forms have been destroyed. Whether I call[ed] it the right name or not, they're in the employee personnel file, bluebook file, or in our records warehouse or what have you. There is no reason to destroy any files that reflect the performance of an individual."' Pet. App. A-3, p. 7, 8; and A-4, p. 5.
>
> Second, "'It is apparent that the requested personnel performance documents of the Caucasian Ph.D.'s in the R&D department (Drs. Ruf, Bailey, Wagener, Maisch, Weber, Br[o]nsky, Wolfram, and Baldwin) do exist, and are in the possession of ...[Seagram], as admitted by the testimony of its vice-president. Plaintiff is plainly entitled to these documents and similar documents relating to the Caucasian co-workers with master's or bachelor's degrees (Coffey, Panek, Scalf, Sanders, and Bosworth.)"' Pet. App. A-3, p. 8.
>
> Third, "'...[Seagram] has **knowingly** refused to produce them [i.e., the job-performance evaluations specified above] in violation of its prior [written] negotiated agreement with [me]."'

Pet. App. A-3, p. 7. (emphasis added).

Seagram has admitted that it did not produce any additional documents after the **discovery Orders** were entered. Seagram has never stated under oath that the requested documents are not in its possession, custody or control. Further, Seagram has never disputed the fact it has never produced even one job-performance evaluation on 11 of the 13 Caucasian employees who were named in the **discovery Orders**. These 11 employees alone had a combined total of over 90 years of employment in the company's R&D department during the time frame of the initial request. For the remaining two Caucasian employees, Seagram produced a total of only 23 pages of documents even though these two employees had a combined total of over 25 years of employment in the company's R&D department during this period. Of the 23 pages produced, two pages had been unilaterally redacted prior to production, *infra*. Considering the findings of fact by the magistrate judge that "[n]o forms have been destroyed," the magnitude of the nonproduced job-performance evaluations on the 13 Caucasian employees is well outside the bounds of reason.

Despite the dearth of production together with the findings of fact by the magistrate judge that Seagram is **"knowingly"** withholding the requested job-performance evaluations which are in its possession and which pertain to material facts, the district court on

March 31, 1994 declined to impose sanctions against the company for noncompliance with the discovery Orders, supra. The district court instead stated in its Order that "A review of the record convinces [the district] court that [Seagram] has made every effort to comply with [my] discovery requests...." Pet. App. A-5, para. 3. The rules of discovery (as did the **discovery Orders**) require a party to produce material documents which are in its possession, not just make "every effort to comply." Rules 26(f) and 34 of the Fed.R.Civ.P.

When I raised the issue of this error of law on appeal, the Sixth Circuit then arbitrarily and capriciously manufactured a new fact by stating that: "[T]he district court ultimately determined that Seagram had complied fully with [my] discovery requests." Pet. App. A-6, p. 2. There is no such determination in the record. For the Sixth Circuit to let Seagram get away with not producing material documents which the magistrate judge found in Seagram's possession is a clear abuse of discretion, contrary to the rule of discovery and the clear intent of Congress, and it is clearly erroneous. If the Sixth Circuit is upheld, then an alleged wrongdoer, such as Seagram, with **court-ordered**, material documents in its possession could escape Title VII liability simply by making "every effort to comply" with the **discovery Orders**.

It is fair and reasonable to conclude that I was fatally prejudiced

because the **discovery Orders** pertaining to material facts were not enforced by the Sixth Circuit. I know of no published authority which would allow a party to prevail who **"knowingly"** refused to produce **court-ordered** job-performance evaluations which (i) "do exist;" (ii) "are in the possession of..." the employer; and (iii) pertain to material facts, *supra*.

In its Order, the Sixth Circuit stated that "...we find no abuse of discretion in the district court's ruling on discovery, citing Plott v. General Motors Corp., Packard Elec. Div., 71 F.3d 1190, 1196 (6th Cir. 1995), *cert. denied.* 116 S.Ct. 1546 (1996). The Sixth Circuit offered no discussion to explain the basis for its decision. In any event, the Plott decision in a five-part conjunctive test which set forth the relevant factors for review under an abuse of discretion standard: (i) when the appellant learned of the issue; (ii) whether the desired discovery would have changed the rulings; (iii) how long discovery lasted; (iv) whether the appellant was dilatory is his discovery efforts, and (v) the responsiveness of the appellee to discovery requests. Plott, 71 F.3d at 1196-97.

The Plott decision relates to discovery requests, while my specific issue pertains to the district court's nonenforcement of its **discovery Orders**. This is a different issue. If the "district court ultimately determined that Seagram had complied fully with [my]

discovery requests" as the Sixth Circuit arbitrarily contends, *supra,* then it made no sense at all to apply Plott. I know of no published authority which allows an appellate court to transform a material fact to fix existing law. Clearly, the Sixth Circuit applied the wrong law to my particular situation. The appropriate law would be the imposition of sanctions under Rule 37(d)(2) Fed.R.Civ.P. as set out in my motion for sanctions against Seagram. Record 103. Further, my motion for sanctions was before the district court more than seven (7) months before it granted summary judgment to Seagram. The district court committed clear error when it ruled on this motion and granted Seagram summary judgment all on the same day.

In 1857, this Court ruled that a slave is not a legal person. Black men, women and children could be bought and sold. In a later decision, this Court ruled that a black person was only 3/5th human and hence not equal to a white person. In the case at bar, depriving me of the benefit of the **court-ordered discovery** by the Sixth Circuit in essence is a throw-back to "Jim Crowism" in that a black person is not wholly legal yet and, therefore, not entitled to examine lawsuit documents which are maintained on certain white people. This is the only conclusion that I can draw.

In one of its recent opinions, this Court wrote that America's goal is to achieve a "colorblind society." Surely then, fairness and equal justice in the

judicial system must be an essential element toward achieving that goal. This is my last avenue for fairness and justice to prevail to restore my Constitutional rights. I sincerely hope that this Court has the courage to exercise its supervisory powers and affirmative duty and do the right thing in the present case. Clearly, I am entitled to a fair and equitable remedy in the instant lawsuit.

II.

THE SIXTH CIRCUIT CLEARLY ABUSED ITS DISCRETION WHEN IT FAILED TO ADDRESS THE ISSUE OF SEAGRAM, PRIOR TO PRODUCTION, REDACTING DISCOVERABLE JOB-RELATED DOCUMENTS WHICH PERTAIN TO A MATERIAL FACT.

To attempt to corroborate one of my allegations about retaliatory acts, I finally tried unsuccessfully to discover copies of the text of job-related documents, pertaining to a material fact, on two of my Caucasian co-workers who were involved in a research project with me, Jan Chipman and Panek. Seagram has never disputed the fact, and has in essence admitted, that it unilaterally redacted the requested documents prior to production. Additionally, Seagram has never disputed the fact that counsel for both parties signed a written agreement, with is part of the Record, stipulating that any requested document containing confidential information would be filed for an In Camera inspection. Further, Seagram has never disputed fact that it has neither produced any of these

documents unredacted nor filed any documents for an In Camera inspection.

The Sixth Circuit abused its discretion and committed reversible error when it refused to address the issue of Seagram's concealing material evidence by redacting these documents. By its silence, the Sixth Circuit in essence gave judicial approval to creating the absence of a material fact through redacting. A party may not create the absence of a genuine issue of material fact by concealing evidence. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). This also is in clear violation of Rule 34 of the Federal Rules of Civil Procedure, and the clear intent of Congress. I know of no published authority which would allow a party to prevail who willfully conceals material evidence by redacting. A review is therefore required in the interest of justice.

III.

THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT REFUSED TO ADDRESS THE ISSUE OF THE DISTRICT COURT NOT ALLOWING ME TO DISCOVER CERTAIN OF SEAGRAM'S PERSONNEL POLICIES AND PROCEDURES GOVERNING ITS EMPLOYEES, INCLUDING ME, AFTER 1983 .

It is well-established law that the employer's personnel procedural policies is the contract between the company and its employees. A copy of the physical contract is fundamental and requisite in this type of lawsuit to document the relationship between the parties. For this purpose, I tried unsuccessfully to

discover a copy of the written policy and procedural guidelines which Seagram used to govern its employees during my last two (2) years of employment with the company. Specifically, I was attempting to discover Seagram's written policies and procedures pertaining to promotability, promotions and its "internal / external search" process to fill existing and projected job vacancies. Moreover, these documents are relevant because I alleged in my original Complaint that Seagram intentionally applied specific personnel policies in a racially discriminatory manner. Pet. App. A-1. para. 8, 10. The district court denied my motion to compel discovery. Further, the district court failed to rule on my motion to reconsider. The discovery of these documents is essential to my case and I was substantially prejudiced without them. This issue of not being allowed to discover these procedural documents was raised on appeal. The Sixth Circuit abused its discretion by refusing to address this specific issue.

IV.

THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT APPROVED MY BEING DENIED LEAVE OF COURT TO AMEND MY COMPLAINT TO INCLUDE RECOVERY OF DAMAGES FOR INTANGIBLE INJURIES UNDER THE KENTUCKY CIVIL RIGHTS ACT, AND WHEN IT REFUSED TO ADDRESS THE SPECIFIC ISSUE OF TOLLING THE STATUTE BECAUSE SEAGRAM WILLFULLY CONCEALED MATERIAL FACTS.

It is commonplace for litigants to amend their original complaints under

Rule 15 of the Federal Rules of Civil Procedure to conform with newly discovered evidence, and with new law when applicable. This Court has held that the decision to allow plaintiffs to amend their complaints should be liberally granted in the absence of undue delay, bad faith, undue prejudice, or futility of amendment. Foman v. Davis 371 U. S. 178, 182 (1962). See also General Elec. Co. v. Sargent & Lundy, 916 F.2d 1119, 1130 (6th Cir. 1990).

Damages for intangible injuries were not available in federal court for Title VII plaintiffs in 1987 when the instant lawsuit was filed. However, Kentucky plaintiffs could amend their Title VII complaints in federal court to recover damages for intangible injuries under the Kentucky Revised Statutes for the first time in 1989. Ky. Rev. Stat. ss344.450; and Mitchell at 454. The statute of limitations is five years. My motion to amend my original Complaint was filed in April 1992 more than five years after the date of incident, but less than three years after the law became effective. The spirit of a statute is not to short circuit a plaintiff's right based on a mere technicality. Proper application should be based on the merit, Conley v. Gibson, 355 U.S. 41, 48 (1960). In the present case, I would have to win the underlying case before damages for intangible injuries could be applied anyway. Common sense law tells us that if the underlying case proves to be meritorious, then damages for intangible injuries should necessarily flow from it.

Therefore, a defendant would not be prejudiced by a mere technicality of alleged tardiness of this type of amendment.

Further, this Court has allowed the statutory filing period to be tolled if the employer fraudulently conceals discoverable documents. Bailey v. Glover, 88 U.S. 342 (1874); and Holmberg v. Armbrect, 327 U.S. 392 (1946). Lower courts have tolled the 180-day statutory period of limitations due to concealment violations in Title VII cases. Scheerer v. Rose State College, 950 F.2d 661 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 2995 (1992); and Pearson v. Macon-Bibb County Hosp. Auth., 952 F.2d 1274 (11th Cir 1992). Accordingly, the statute of limitations cannot begin until the concealment ends as a matter of law.

Since Seagram had not produced my complete personnel file (willfully or negligently) and since the magistrate judge made a finding of fact that no job-performance evaluations had been destroyed and are within Seagram's possession, the same principle of tolling the statute of limitations should apply here based on concealment. It was clear error not to allow me to discover my complete personnel file first, and then amend my original Complaint to conform to the facts. Fed.R.Civ.P. Rule 15.

While I knew that I had suffered intangible injuries, but my hurt feelings may not be statutory actionable, or, the instant case may also be actionable, in

part, under a different statute. It makes sense, therefore, to discover the facts first. In any event, the statute of limitations should not begin to run until Seagram relinquishes the remainder of my personnel file

The Sixth Circuit refused to address the specific issue of Seagram concealing substantial portions of my personnel file by a scheme of a "privileged documents" designation, *supra.* Any perceived prejudice to Seagram was brought on by Seagram's own recalcitrance regarding nonprodouction. Withal, the Sixth Circuit abused its powers by not allowing me to file of record my amended Complaint. A review is warranted in the interest of fairness and justice.

V.

THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS .

In its 1985-86 term this Court issued three landmark decisions giving district courts great latitude and discretion in disposing of cases by way of summary judgment when there is no genuine issue of material fact, Fed.R.Civ.P. 56(c). The authorities which govern summary judgment in federal court are Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Celotex, 477 U.S. at 317, 323 (1986); and Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 586 (1986). The Sixth Circuit has adopted this new

summary judgment practice, Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989).

When viewed in harmony with each other, a fair and reasonable reading of these authorities is that a district court should not entertain a motion for summary judgment before the plaintiff has had a full and fair opportunity to conduct adequate discovery. Further, a fair and reasonable interpretation of the phrase "full and fair opportunity" to conduct "adequate discovery" does not mean the mere passage of time. Rather, it means timely request and **actual** production of the requested documents pertaining to material facts which are in the possession of the defendant. The opposing party cannot create the absence of genuine issue of material fact by nonproduction (and **redacting**, supra.) of documentary evidence. Celotex Corp., 477 U.S. at 323.

A fair and reasonable interpretation of the authorities governing discovery and summary judgment is that the nonmoving party should have the benefit of the court's discovery rulings before responding to any motion for summary judgment.

In the present case, I had filed motions to compel discovery before Seagram moved for summary judgment for the first time. I also had a motion for sanctions for noncompliance with the **discovery Orders** before the district court entertained Seagram's first motion

for summary judgment on my claims for constructive discharge and failure to promote. The district court denied all of my discovery motions and awarded summary judgment to Seagram on the same day. Clearly, this was a departure from the accepted and usual course of judicial proceedings.

In an obvious attempt to give the appearance that the district court had followed the accepted and usual judicial course of proceedings, the Sixth Circuit arbitrarily and capriciously stated that Seagram moved for summary judicial after the ruling on the discovery dispute had been made. Pet. App. A-6, p. 2. In truth and fact, Seagram moved for summary judgment 10 months **before** the district court made its final rulings on the discovery disputes. I was substantially, if not fatally, prejudiced by the district court's clear departure from what is the accepted, usual and logical in this regard, and by the approval of this error of law by the Sixth Circuit.

VI.

THE SIXTH CIRCUIT ABUSED ITS POWERS AND COMMITTED CLEAR AND REVERSIBLE ERROR WHEN IT GAVE JUDICIAL APPROVAL OF MY BEING FORCED TO TRY TO RESIST SUMMARY JUDGMENT AND TO TRY TO CARRY MY BURDENS AT TRIAL WITHOUT THE BENEFIT OF ANY OF THE COURT-ORDERED JOB-PERFORMANCE EVALUATIONS PERTAINING TO MATERIAL FACTS .

A Title VII plaintiff may establish a *prima facie* case of discrimination by

showing the existence of circumstantial evidence to create an inference of discrimination by way of a four-part test. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). A Title VII plaintiff may bypass the McDonnell test by presenting direct evidence of intentional discrimination by the defendant, Terbovitz v. Fiscal Court, 825 F.2d 111, 114-115 (6th Cir. 1987)(citing Trans World Airlines, Inc., v. Thurston, 469 U.S. 111, 121 (1985).

To survive thereafter, a plaintiff must also defeat any articulated legitimate, nondiscriminatory business reason for the adverse action, and then meet his ultimate burden of proof. St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747-48 (1993); Texas Dept't of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981).

A claim for retaliatory acts has the same sequence and burden of proof as above for failure to promote. However, a different four-part test is used to establish a *prima facie*. Christopher v. Strouder Memorial Hospital, 936 F.2d 870, 877 (6th) Cir.), cert. denied, __ U.S. __, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991). Again, the ultimate burden of persuasion remains with the plaintiff at all times.

The standards for constructive discharge in the Sixth Circuit have been well established: the employer created working conditions that were so "difficult or unpleasant" that a

reasonable employee in my shoes would feel compelled to resign. Yates v. AVCO Corp., 81[illegible] F.2d 630, 636 (6th Cir 1987).

The employer may create the "difficult or unpleasant" workplace environment by one incident of discrimination, if serious enough, or by multiple acts of discrimination done concurrently with each other. Bruhwiler v. Univ. of Tennessee, 859 F.2d 419 (6th Cir. 1988).

In the present case, for my constructive discharge claim I am proceeding under the principle of both single and concurrent, multiple incidents, i.e., failure to promote, retaliatory acts, and/or subjection to different job standards, *supra*. It is fair and reasonable to conclude that all these legal tests, standards and ultimate burdens of persuasion, as set forth above, are inherently based on the proposition that the plaintiff has had a fair and full opportunity to discover documents in the possession of the defendant which pertain to material facts. Without the benefit of the withheld court-ordered discovery at trial, the district court had to invoke Fed.R.Civ.P. 52(a) to make his evaluation based on oral testimony.

The district court forced me into the untenable position, which was approved by the Sixth Circuit, to try my case on oral testimony. This was unfair and unreasonable, and clearly erroneous because the lower courts programmed my

demise at trial when they did not enforce the **discovery Orders**, supra. My demise was compounded by the fact that I was not allowed to discover Seagram's personnel procedural documents covering my last two years with the company, *supra*. Obviously, I did not want to be forced into this posture as evidenced by my motions to compel discovery of documentary evidence, and my motion for sanctions. Accordingly, all the ruling adverse to me which occurred after nonenforcement of the **discovery Orders** were clearly erroneous. Surely, a review is warranted.

VII.

THE SIXTH CIRCUIT ABUSED ITS DISCRETION WHEN IT REFUSED TO ADDRESS THE ISSUE OF THE DISTRICT COURT DISMISSAL OF MY CLAIM FOR CONSTRUCTIVE DISCHARGE WHILE THE THREE SUPPORTING CLAIMS WERE STILL VIABLE, AND DISMISSAL OF THE WHOLE CASE WITHOUT DEALING WITH MY CLAIM FOR SUBJECTION TO DIFFERENT JOB STANDARDS .

The supporting elements of my claim for constructive discharge included (i) failure to promote; (ii) retaliatory acts and subjection to job-performance standards which differed from my Caucasian counterparts. The district court dismissed my claim for constructive discharge while the latter two supporting claims were left standing. Clearly, the district court departed from a logical sequence of accepted and usual course of judicial proceedings. (This was like burning my house down before it was built.) It is fair and reasonable to

conclude that I was substantially if not fatally prejudiced by the district court's departure from the accepted order of proceedings. This issue was raised on appeal, but the Sixth Circuit refused to address this specific issue without comment. Further, the Sixth Circuit also refused to deal with the issue raised concerning the district court's dismissal of my whole case without addressing my claim for subjection to different job standards. This claim was made in my original Complaint at Paragraph 8 Pet. App. A-1

VIII.

THE INSTANT CASE IS OF EXCEPTION PUBLIC INTEREST IN THE CIVIL-RIGHTS COMMUNITY BECAUSE OF THE UNWILLINGNESS OF THE COURT TO ENFORCE ITS DISCOVERY ORDERS .

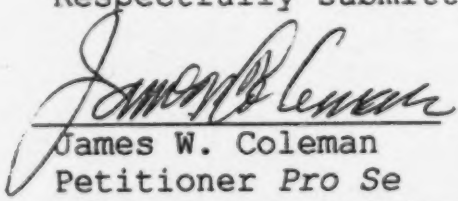
Since 1990, several national and local civil-rights organizations have been actively involved in the instant lawsuit. Over the years, they have sent letters to Seagram urging the company to relinquish the discoverable documents and let the case succeed or fail based on the documentary evidence. In printed circulations, the community has expressed a good faith belief that Seagram is hiding material evidence which is likely to prove every element of my case. After the Sixth Circuit issued its decision favoring Seagram's noncompliance with the discovery Orders, seven (7) local civil-rights groups and a city of Louisville, Kentucky official sent letters to federal authorities asking for a criminal probe into allegations of destroying or

withholding and concealing material evidence to obstruct justice. Considering the findings of fact, clearly the job-performance evaluations at issue are being withheld or were destroyed after the **discovery Orders** were entered. The civil-rights groups reasoned that if Seagram is allowed to destroy or withhold and conceal material evidence, this would have a chilling and deterring effect on nonparties who may wish to seek redress of their grievances under Title VII.

CONCLUSION

As discussed herein, my rights guaranteed under the United States Constitution have been violated. For all the foregoing reasons, I respectfully request that my petition for a review be **GRANTED**, and the case be reversed and remanded with instructions on discovery and for a trial on all issues.

Respectfully submitted,



James W. Coleman
Petitioner *Pro Se*
8622 Blackpool Drive
Louisville, KY 40222-5667
(502) 426-5815

APPENDIX A-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE, KENTUCKY

DR. JAMES W. COLEMAN
8622 Blackpool Drive
Louisville, Kentucky 40222

PLAINTIFF

VS. CIVIL ACTION NO. C-87-0022-L-B

JOSEPH E. SEAGRAM & SONS, INC.
SERVE: U.S. Corporation Company
600 West Main Street
Louisville, Kentucky 40202
Process Agent

DEFENDANT

COMPLAINT

I. JURISDICTIONAL STATEMENT

1. This is a suit and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 USC [ss] 2000 E, Et Seq. Jurisdiction of this Court is invoked pursuant to 42 USC, Et Seq., and 28 USC 1343 (4).

II. PRELIMINARY STATEMENT

2. The conditions pertaining to establishing jurisdiction of this Court have been complied with in that a charge of employment discrimination was filed

with the Equal Employment Opportunities Commission within ninety (90) days of commission of the unfair employment practice, on the 11th day of September, 1985. A notification of right to sue was issued by the Equal Employment Opportunities Commission on the 10th day of October, 1986, and further, this complaint has been filed within ninety (90) days of receipt of said notice of right to sue.

III. PARTIES

3. The Plaintiff, **DR. JAMES W. COLEMAN**, is a black male citizen of the United States, and of the Commonwealth of Kentucky, and resides at 8622 Blackpool Drive, Louisville, Kentucky.

4. The **JOSEPH E. SEAGRAM & SONS, INC.**, is a corporation, incorporated under the laws of the State of **INDIANA**, and is qualified and licensed to do business in the Commonwealth of Kentucky, and further said corporation is doing business within the confines of the State of Kentucky.

5. The unlawful employment practices alleged herein were committed within the confines of the Commonwealth of Kentucky.

VI. FACTUAL ALLEGATIONS

6. The plaintiff, a Black citizen of the United States residing in the Commonwealth of Kentucky, has been an employee of the defendant corporation.

And further, plaintiff has been denied equal employment opportunities by defendant solely because of his race and color.

7. During the period of employment, plaintiff states that he has been denied consideration for promotion on the basis of his race, and further, the company has refused to promote him to a supervisory position, in violation of existing company policy.

8. That the defendant has refused to maintain and utilize the same standards available to similarly situated white employees regarding promotion, and has failed to maintain the same standards and documentation to allow plaintiff's upward mobility in the defendant corporation solely on account of plaintiff's race.

9. Plaintiff further states that he has been overlooked for promotional opportunities because of his activities, and speaking out, and admonishing the defendant corporation for its discriminatory practice toward Blacks.

10. Plaintiff further states that he would have been entitled to a promotion to a supervisory position within the confines of the employment of defendant corporation, however, said position was denied to plaintiff and temporarily given to an individual with less seniority, and then awarded to another person, all in violation of prior company practice.

11. That as result of the discriminatory practice of defendant corporation, the plaintiff was forced to resign his position of employment on August 31, 1985.

WHEREFORE: The plaintiff, DR. JAMES W. COLEMAN, demands:

1. That the Court award the plaintiff compensatory damages, representing a earnings, wages, or any other benefits that he would have received but for the discriminatory practice of the defendant.

2. That the Court award the plaintiff the cost of this action including but not limited to a reasonable fee for attorney of record.

3. That the Court grant any other relief to which the plaintiff may be other wise properly entitled.

Respectfully submitted,

"/s/ James P. Green
JAMES P. GREEN
ATTORNEY FOR PLAINTIFF
606 WEST MUHAMMAD ALI BLVD.
SUITE 503
LOUISVILLE, KENTUCKY 40203
(502) 585-2374-5

"/S/ James W. Coleman
DR. JAMES W. COLEMAN,
PLAINTIFF

Comes now plaintiff, DR. JAMES W. COLEMAN, and states that he has read the foregoing Complaint and that the statements contained therein are true to the best of his knowledge and belief.

"/s/ James W. Coleman

DR. JAMES W. COLEMAN

Subscribed and sworn to before me by DR. JAMES W. COLEMAN this 8th day of January, 1987.

My Commission expires November 21, 1987.

"/s/ Jessie H. Tucker
Notary Public, State at Large Kentucky

APPENDIX A-2

UNITED STATED DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES W. COLEMAN

V. CIVIL ACTION NO. 87-0022-L(S)

JOSEPH E. SEAGRAM & SONS, INC.

MEMORANDUM OF PRETRIAL CONFERENCE AND ORDER

A pretrial conference was conducted by the Court on November 30, 1990. The plaintiff, Mr. James W. Coleman, appeared in person with retained counsel, Mr. William H. Allison, Jr. Mr. John W. Ohlweiler and Mr. Frank Chuppe appeared on behalf of the defendant, Joseph E. Seagram [&] Sons, Inc.

Counsel for the plaintiff requested all documents pertaining to plaintiff in defendant's files. Counsel for the defendant stated that copies of all documents in their possession had been given to the plaintiff.

Pursuant the provisions of Title 28 U.S.C. [ss] 636(b)(1)(A), and the Court being otherwise sufficiently advised,

IT IS THEREFORE ORDERED that if defendants have or discover any remaining documents, copies should be furnished to

plaintiff, except those that are considered privileged in this action.

Dated: November 30, 1990

"/s/ George J. Long
GEORGE J. LONG,
CHIEF, U.S. MAGISTRATE
UNITED STATES DISTRICT COURT

Copies: Counsel

ENTERED
DEC 03 1990
jesse w. grider,
clerk
by
deputy clerk
"/s/ K Numan

APPENDIX A-3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES W. COLEMAN, Ph.D.
PLAINTIFF

vs. CIVIL ACTION NO.
C87-0022-L(M)

JOSEPH E. SEAGRAM & SON[S, INC.]
DEFENDANT

ORDER

This matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. [ss]636(b)(1)(A) for consideration of pending motions. Three motions are pending before the Court. Plaintiff has filed a motion for leave to file a first amended complaint (Docket No. 58), and a motion to propound in excess of thirty requests for admission (Docket No. 57). Defendant has filed a motion to terminate discovery (Docket No. 61). Both parties have filed appropriate responses and replies (Docket Nos. 61, 64, 65).

The first motion addressed is the plaintiff's motion for leave to file an amended complaint. Plaintiff moves to amend his complaint for racial discrimination under Title VII, 42 U.S.C. [ss] 2000e, et seq. to add a claim for

emotional and mental injuries pursuant to the Kentucky Civil Rights Act, K.R.S. Chapter 344 (Docket No. 58. p. 1). Plaintiff argues that this amendment is simply to add a damage remedy and does not affect liability issues or prejudice the defendant in any fashion. Defendant responds that the plaintiff's motion to amend is untimely, highly prejudicial, and futile since the plaintiff's potential claim is time-barred by the five year statute of limitations (Docket No. 61, pp. 10-11, 16-27).

Plaintiff's motion is governed by Fed.R.Civ.P. 15(a). Rule 15 permits a party to amend its pleadings by leave of court, or by written consent, once a responsive pleading has been filed "and leave shall be freely given when justice so requires" Fed.R.Civ.P. 15(a) (West 1992). The Supreme Court has held in Foman v. Davis, 371 U.S. 178, 182 (1962), that leave to amend should be liberally granted in the absence of undue delay, bad faith, undue prejudice, or futility of amendment.

There is no question that the present suit is an old one. The initial complaint was filed on January 12, 1987, more than six years ago. Plaintiff's motion to amend was not filed until five years and three months later in April of 1992. The motion to amend contains no explanation for this extraordinary delay. Further, the amended complaint does not contain any factual allegations that were not known to the plaintiff when the

original complaint was filed in 1987. These facts alone suggest undue delay.

Plaintiff argues in his reply that prior to Mitchell v. Seaboard Systems, Inc., 883 F.2d 451 (6th Cir. 1989), the courts of this district held that general compensatory damages were not recoverable under K.R.S. 344.450 See Ellis v. The Logan Co., 543 F. Supp. 586 (W.D. Ky, 1982); Berry v. General Elec. Co., 541 F. Supp. 800 (W.D. Ky. 1982). Plaintiff concludes that this "unsettled and confusing state of the law" explains the delay in filing (Docket No. 64, pp. 2-4).

The Magistrate Judge disagrees for several reasons. First, accepting this argument on its face, the plaintiff still delayed until three years after the Mitchell decision before filing his motion to amend. No explanation is offered for this delay, except the speculation that the plaintiff's prior attorney (his second counsel) was probably unaware of Mitchell. Such reasoning merely reinforces a lack of due diligence and is hardly persuasive.

Plaintiff's position is further undercut by his arguments regarding notice. Plaintiff concedes at Section III of his Reply (Docket No. 64, pp. 4-5), that his prior attorney, the Honorable William Allison, in his 1988 correspondence to the defendant's counsel stated that the plaintiff's claims could only be settled upon payment of "damages for pain and suffering." Thus,

regardless of prior counsel's ignorance of Mitchell, it is clear that the plaintiff intended since at least April of 1988 to seek recovery for emotional injuries, but did not attempt to amend the complaint to seek such recovery until for years later.

While it is true that the mere passage of time will not justify denying leave to amend, delay may become fatal with the passage of time. Gregory v. Mitchell, 634 F.2d 199, 203 (5th Cir. 1981). Where there is an apparent lack of due diligence, the burden falls on the movant to justify the delay. Daves v. Payless Cashways, Inc., 661, F.2d 1022, 1025 (5th Cir. 1981). Unjustified delay coupled with resulting prejudice will warrant denying leaves to amend pursuant to Rule 15(a). See Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618, 625 (7th Cir. 1987); Ross v. Houston Independent School Dist., 699 F.2d 218, 228 (5th Cir. 1983). Clearly, the delay was undue.

The Magistrate Judge must now decide whether the defendant will be unfairly prejudiced. Plaintiff's amended complaint seeks to recover damages for emotional injuries, which include humiliation, distress, and mental anguish. Defendant argues that if the motion is granted, it will be substantially prejudiced by the burden of taking additional discovery on the plaintiff's mental state long after the relevant facts occurred (Docket No. 61,

pp. 21-23). Defendant points out that extensive discovery has already been taken, and that at least two of the key witness, who may have testimony concerning the plaintiff's prior mental state, are no longer in the employ of the defendant (Id.).

The Magistrate Judge agrees. Permitting the plaintiff to raise the issue of his mental state at this point in the litigation would be unfairly prejudicial to the defendant. First, it would require redeposing at least five witness, the plaintiff and four of his co-workers. Second, the defendant would be denied the benefit of any contemporaneous psychological or psychiatric evaluation which it would otherwise be entitled to have pursuant to Fed.R.Civ.P. 35. Finally, even were the relevant time period limited to the early 1980's, it is clear that the memories of the relevant witnesses concerning the plaintiff's demeanor would now be long faded. Accordingly, the Magistrate Judge concludes that not only is the plaintiff's delay unjustified, such delay unfairly prejudices the defendant. See Clark v. Township of Falls, 890 F.2d 611, 624 (3rd Cir. 1989); Parker v. Joe Lujan Enter., Inc., 848 F.2d 118, 121 (11th Cir. 1988). Plaintiff's motion for leave to file an amended complaint is **DENIED**.

The Magistrate Judge next turns to the motion of the defendant to terminate discovery (Docket No. 61, pp. 27-36). Defendant's motion to terminate is the

result of the plaintiff's motion for leave propound in excess of thirty interrogatories (Docket No. 57). These interrogatories relate to the plaintiff's ongoing attempts to obtain employee performance evaluations, summaries, appraisals, and "bluebooks" relating to certain of the plaintiff's Caucasian co-workers in the defendant's research and development department. Plaintiff argues that these evaluation documents are essential to his claim; that as a Black Ph.D. employee, he was denied promotional opportunities accorded to less qualified Caucasian Ph.D. employees and employees with less education (Docket No. 65). Defendant argues that the prior order of the Magistrate Judge entered on November, 1990, has resolved this dispute, and that it has produced all relevant, non-privileged documents that relate to the plaintiff's prior two sets of interrogatories and request for production (Docket No. 61, pp. 27-36).

Upon consideration of the parties' arguments and exhibits, the Magistrate Judge concludes that the plaintiff's motion to propound in excess of thirty requests for admission is **GRANTED**. The motion of the defendant to terminate discovery is **DENIED**. The scope of discovery in general, and in Title VII actions, is broad. Title VII plaintiffs are entitled to that information needed to establish employment discrimination where it exists. Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431 (D.C. Pa. 1978). The broad scope of discovery is

limited only by relevance and by burdensomeness. Milner v. Nat'l. School of Health Tech., 78 F.R.D. 628 (D.C. Pa. 1977).

Although the present suit is longstanding, the parties' dispute over the production of the requested personnel records remains unresolved. The Court's prior order of November 30, 1990, did not address the issue, but relates only to the plaintiff's own personnel records, rather than those of his co-workers within the R&D department. This is confirmed by the plaintiff's status report of June 12, 1991, which, from its outset, is directed to the "lack of court ruling on all elements of plaintiff's motion to compel discovery." (Docket No. 46, p. 1), original emphasis). Thus, the Magistrate Judge is not revisiting a "non-issue that has been previously ruled on."

The history of this litigation strongly suggests that the requested documents do exist, and that the defendant has knowingly refused to produced them in violation of its prior negotiated agreement with the plaintiff. Defendant's vice-president and custodian of personnel files, Robert Cherundolo, testified that:

> Whatever forms were completed, we have them .. .. No forms have been destroyed. Whether I call[ed] it the right name or not, they're in the

> employee personnel file, bluebook file, or in our records warehouse or what have you. There is no reason to destroy any files that reflect the performance of an individual.

It is apparent that the requested personnel performance documents of the Caucasian Ph.D.'s in the R&D department (Drs. Ruf, Bailey, Wagener, Maisch, Weber, Br[o]sky, Wolfram, and Baldwin) do exist, and are in the possession of the defendant, as admitted by the testimony of its vice-president. Plaintiff is plainly entitled to these documents and similar documents relating to the Caucasian co-workers with master's or bachelor's degrees (Coffey, Panek, Scalf, Sanders, and Bosworth). The critical nature of the documents, and the fact that they were not requested until the plaintiff's second set of interrogatories and requests on April 11, 1991, (after the November 30, 1990, order) underscores the meritless nature of the defendant's request to terminate discovery.

Defendant shall serve on the plaintiff within thirty (30) days of the date of entry of this order its answers to requests for admission. Plaintiff shall have twenty (20) days thereafter to file appropriate motions, if any, relating to the documents at issue. The time for response and reply to any such motions by the plaintiff shall be governed by Joint Local Rule 6.

IT IS SO ORDERED THIS 2ND DAY OF FEBRUARY, 1993.

"/s/ C. Gambill

C. Cleveland Gambill
United States
Magistrate Judge

Copies to:
Counsel of Record

ENTERED
FEB 3 1993

jesse w. grider,
clerk
by
deputy clerk

"/s/ L. Grimes

APPENDIX A-4

UNITED STATED DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES W. COLEMAN, Ph.D.
PLAINTIFF

vs. CIVIL ACTION NO.
C87-0022-L(M)

JOSEPH E. SEAGRAM & SONS, INC.
DEFENDANT

ORDER

This matter is before the Magistrate Judge for consideration of pending motions. Plaintiff has filed a series of motion, including: (1) a motion for reconsideration of the prior order denying leave to file an amended complaint; (2) a second motion to compel discovery; (3) a motion to propound in excess of 30 interrogatories; and (4) a third motion to compel discovery (Docket Nos. 76, 82, 92, 93). Defendant has responded (Docket Nos. 86, 87, 94). Plaintiff has replied (Docket Nos. 90, 95).

Turning to the plaintiff's first motion, the Magistrate Judge concludes that the plaintiff has offered no substantial reason to justify amending the February 3, 1993, order which denied the plaintiff's motion to amend (Docket

No. 77). First, the plaintiff's motion for reconsideration in untimely. A party may serve and file objections to the nondispositive order of a magistrate judge within ten days after being served with a copy of the order. Fed.R.Civ. P. 72(a). Beyond this time limit, "a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made." Id. As noted, the order was entered on February 3, 1993 (Docket No. 77). Allowing three days for service by mail, the ten-day limit of Rule 72a) expired on February 16, 1993. The certificate of service accompanying the plaintiff's motion to reconsider reveals that the motion was not served until March 5, 1993, some seventeen days after the expiration of the time in which to serve and file written objections to the order.

Further, the motion for reconsideration, on its merits, is unpersuasive. Plaintiff complains that the delay in filing its motion to amend is attributable to two factors: (1) the refusal of the plaintiff's prior counsel to timely file a motion to amend, contrary to the plaintiff's request; and (2) the alleged refusal of the defendant to timely provide the documentation which would support the plaintiff's claim for mental anguish and emotional injuries.

As the defendant points out, any dispute between the plaintiff and his prior counsel concerning that counsel's refusal to file an amended complaint is a

matter between the plaintiff and that attorney, and is not a basis to grant leave to amend six years after suit was filed. See Link v. Wabash RR Co., 370 U.S. 626 (1962); United States v. Johnson, 752 F.2d 206, 210 (6th Cir. 1985). Further, the nature of the proposed claim is one which would render information concerning it peculiarly within the control of the plaintiff. Plaintiff is best able to know of and document has metal anguish and emotional suffering. The alleged failure of the defendant to timely provide certain employees evaluation records concerning other employees in the research and development department has no bearing the plaintiff's failure to timely file his claim. Plaintiff's motion is DENIED.

The remaining motions filed by the plaintiff all address to one extent or another the parties' ongoing dispute over the production of certain personnel records pertaining to employee job performance, including "bluebook" performance appraisals, performance summary forms, supervisor notes, merit review ratings, development and performance plan and assessment summaries. Plaintiff maintains in his motion that the defendant is knowingly withholding these critical employment records, which the plaintiff maintains are within the control or possession of the defendant as proven by the testimony of [...] its own employees, or representations of its counsel. Defendant argues that it has made

repeated good faith efforts to search all of its document storage facilities in Kentucky and New York to locate the requested documents. Repeated searches, according to the defendant, have failed to reveal any additional documents beyond the 3,000 pages of documents already produced to the plaintiff. Defendant concludes that the plaintiff's present motions are duplicative, oppressive and meritless.

Consideration of these arguments is governed by Fed.R.Civ.P. 34, which governs the production of document and things in the possession, custody or control of a party. A Rule 34 request applies only to parties to the litigation. See 4A Moore's Federal Practice. [ss]34.05[1], pp. 24-28 (Matthew Bender 1993). The documents or things requested must be within the possession, custody or control of a party and already in existence. Id.; Thomas v. Nuss, 353 F.2d 257 (6th Cir. 1965); Knight-Morley Corp. v. Electroline Mfg. Co., 10 F.R.D. 400 (N.D. Ohio 1950). A party who denies under oath that the requested documents exist, or that they are within his custody or control, may not be compelled to produce them. Moore's at [ss]34.17, pp. 34-68. See also In re Aircraft Disaster at Detroit Metro. Airport, 130 F.R.D. 641, 646 (E.D. Mich. 1989); Lachemise Lacoste v. Alligator Co., Inc., 60 F.R.D., 164, 172 (D. Del. 1973).

Defendant relies heavily on this cited case law to insist that the parties' document dispute is at an end. However, the Court remains concerned about the discrepancy in the testimony of Robert Cherundolo, the defendant's Vice-President and custodian of personnel files, and the apparent inability of the defendant to locate a substantial number of its official employee personnel performance files. Cherundolo testified that "whatever forms were completed, we have them...no forms have been destroyed. Whether I call[ed] it the right name or not, they're in the employee personnel file, bluebook file, or in our records warehouse or what have you." Yet the defendant has been unable to locate the personnel performance records for any Caucasian Ph.D. in the research and development department, or the personnel performance records of its research and development employees with Master's or Bachelor's degrees who were promoted to section head within the department. While it is possible, indeed probable, that certain unofficial personnel evaluation forms or notes may have been lost or destroyed in the move from Kentucky to White Plains, New York, the absence of official performance evaluation documentation for the employees included within the above categories is extremely troubling.

To put an end to this issue, the Magistrate Judge, in the exercise of the traditionally broad discretion accorded to the federal courts in discovery

matters, shall **order** the defendant to produce for inspection within thirty (30) days of the date of entry of this order at the offices of its local counsel, Wyatt, Tarrant & Combs, the "personnel records" of the following former or current employees of the defendant: [Ruf]. Bailey, Wagener, Maisch, Weber, Bronsky, Wolfram, Baldwin, Coffey, Panek, Scalf, Sanders, Bosworth, Wathen, Luther and Wang. The personnel records of these individual shall be produced for inspection as they are kept in the usual course of business and shall be organized alphabetically by the Last name of each employee. The term "personnel records" as used includes, but is not limited to including: performance summaries, development reviews, supervisors notes, merit review ratings, position description questionnaires, management incentive plan, performance plan and assessment summaries, "bluebooks." employee personal records, letters of recommendation, promotion summary forms, managerial personnel appraisals, complimentary or disciplinary letters, and any other documents normally maintained in the personnel records of these employees. These records are to be considered strictly confidential and subject to the parties' stipulation of confidentiality. Defendant or its local counsel shall have an employee available to assist the plaintiff's counsel in his review and copying of these records.

In reaching his decision to accord the plaintiff this opportunity for

inspection, the Magistrate Judge has considered the policies underlying the rules of discovery, the respective rights of the parties, the relative financial burden imposed, and the need for a swift end to this continuing dispute. It is hopped that this measure will put an end once and for all to the claims that critical discovery documents are being knowingly with held.

Consideration of the plaintiff's remaining motion for leave to propound in excess of 30 interrogatories, and third motion to compel, shall be held in abeyance pending the defendant's compliance with this order. It is the hope of the Magistrate Judge that such compliance shall put to rest any remaining concerns of the plaintiff, thereby rendering moot his remaining two motions. The Magistrate Judge also notes that the defendant has voluntarily supplemented its response to plaintiff's latest request for admissions. The Magistrate Judge is further hopeful that these supplementary responses will further alleviate the plaintiff's concerns. Finally, the Magistrate Judge is aware that the effect of this order is to extend the previously established discovery deadline of May 1993. The Magistrate Judge considers this result unfortunate, but unavoidable, in view of the parties' dispute over document production.

Date: June 11, 1993

"/s/ C. Gambill"
C. Cleveland Gambill
United States
Magistrate Judge

Copies to:
Counsel of Record

ENTERED
JUN 11 1993

Jesse W. Grider,
Clerk
by: Deputy Clerk
"/s/ G Grimes

APPENDIX A-5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES W. COLEMAN, Ph.D.
PLAINTIFF

vs. CIVIL ACTION NO.
87-0022-L(M)

JOSEPH E. SEAGRAM & SONS, INC.
DEFENDANT

ORDER

This matter is before the court on several discovery-related motions filed by plaintiff.

The defendant has responded thereto.

IT IS HEREBY ORDERED as follows;

1. Motion for ruling on omissions. (Docket entry #101). Plaintiff's motion for ruling on discovery omissions in essence seeks relying on certain aspects of a previously filed motion to compel. This court has reviewed the matter and determined that the defendant has made a fulsome response to plaintiff's requests. THEREFORE, the motion for ruling on omissions is DENIED;

2. Motion for ruling on pending motions. (Docket entry #102). Plaintiff seeks ruling on two discovery motions

previously held in abeyance. The motion for ruling on pending motions is GRANTED. The motion for leave to propound in excess of 30 interrogatories is DENIED. The motion to compel discovery is DENIED; and

3. Motion for sanctions. (Docket entry #103). Plaintiff requests that this court impose sanctions on defendant for failure to comply with plaintiff's discovery requests. A review of the record convinces this court that the defendant has made every effort to comply with plaintiff's discovery requests and as such, sanctions is inappropriate. Therefore, the motion for sanctions is DENIED.

This 31 day of March, 1994.

"/s/" Ronald E. Meredith

RONALD E. MEREDITH
CHIEF UNITED STATES
DISTRICT JUDGE

cc: Counsel of Record

ENTERED
MAR 31 1994
JEFFREY A. APPERSON,
CLERK
BY:
DEPUTY CLERK

APPENDIX A-6

No. 96-5094

UNITED STATES COURT OF APPEALS
FOR SIXTH CIRCUIT

FILED
OCT 31 1996
LEONARD GREEN,
Clerk

JAMES W. COLEMAN, Ph.D.,

Plaintiff-Appellant,

v.

JOSEPH E. SEAGRAM & SONS, INC.,

Defendant-Appellee.

ORDER

Before: GUY, RYAN AND COLE, Circuit Judges.

James W. Coleman, Ph.D., a Kentucky citizen, appeals pro se a judgment for the defendant following a bench trial in this race discrimination in employment action filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. [ss]2000e et seq. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit.

Upon examination, this panel unanimously agrees that oral argument is not needed. Fed R. App. P. 34(a).

Coleman sought monetary damages from his former employer, Joseph E. Seagram & Sons, Inc. (Seagram), alleging that he had been discriminated against on the basis of his race and in retaliation for protected activities when he was denied a promotion and constructively discharged. The case remained pending in the district court for nine years, during which the parties conducted voluminous discovery. More that five years after filing the original complaint, Coleman moved to amend his complaint to include a claim for damages for emotional distress under the Kentucky Civil Rights Act. A magistrate judge denied the motion to amend. Although Seagram produced 3000 pages of employment records of Coleman and other employees, Coleman remained convinced that Seagram was withholding records, and filed a number of motions to compel. The district court ultimately determined that Seagram had complied fully with Coleman's discovery requests. Seagram then moved for summary judgment, which the district court granted as to Coleman's claims of constructive discharge and failure to promote. However, the district court then granted Coleman's motion to reconsider the summary judgment on the failure to

promote claim. The case proceeded to a bench trial, following which the district court entered judgment for the defendant. On appeal Coleman reasserts the merits of his claims and also argues that the was denied discovery and that his motion to amend was erroneously denied.

Upon review, we conclude that Coleman has not demonstrated that any of the findings of fact upon which the district court based its judgment for the defendant are clearly erroneous. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). The district court's finding that Coleman had not established a prima facie case of failure to promote is supported by the record. Coleman did not establish that he was rejected for the promotion he sought. Rather, he removed himself from consideration by his resignation. Moreover, even if the failure to immediately promote Coleman were construed as a rejection, Seagram proffered a legitimate business reason for its delay which Coleman did not demonstrate to be a pretext for discrimination. *See Hale v. Cuahoga Co. Welfare Dep't.*, 891 F.2d 604, 606 (6th Cir. 1989). Seagram explained that it waited to fill the position until after its operations were transferred to New York state, because it was not known which personnel would relocate. Coleman

vacillated about the decision to relocate, and ultimately chose to resign and accept the severance package and early retirement. For the same reason, Coleman did not establish a case of retaliation because no adverse employment action was taken. *See Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987). Similarly, Coleman presented no evidence that a reasonable person would have felt that he was constructively discharged under the circumstances. Coleman assumed the worst when he was not immediately promoted. *See Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991).

Finally, we find no abuse of discretion in the district court's ruling on discovery or in the denial of the motion to amend the complaint. *See Plott v. General Motors Corp., Packard Elec. Div.*, 71.3d 1190, 1196 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 1546(1996); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995).

Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

"/s/ Leonard Green/ js"

Clerk

APPENDIX A-7

No. 96-5094

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

DEC 12 1996
LEONARD GREEN,
Clerk

JAMES W. COLEMAN, PH.D.,

Plaintiff-Appellant,

v.

JOSEPH E. SEAGRAM[] & SONS, INC.,

Defendant-Appellee.

O R D E R

BEFORE: GUY, RYAN, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for

rehearing have been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

"/S/" Leonard Green

Leonard Green, Clerk/m

No. 96-1407

Supreme Court, U.S.
FILED
APR 7 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAMES W. COLEMAN, PH.D.,

Petitioner,

—v.—

JOSEPH E. SEAGRAM & SONS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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Attorneys for Respondent

47PP

QUESTIONS PRESENTED

Whether this Court should exercise its discretionary jurisdiction to review by writ of certiorari an action in which the District Court found, after a trial on the merits in which no evidence was denied admittance by the court, that Petitioner had failed to prove that he had suffered intentional discrimination or retaliation.

Whether this Court should exercise its discretionary jurisdiction to review by writ of certiorari discovery-related decisions of the District Court which were expressly found by the Court of Appeals to have not constituted an abuse of that Court's discretion regarding discovery matters.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1407

JAMES W. COLEMAN, PH.D.,

Petitioner,

—v.—

JOSEPH E. SEAGRAM & SONS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

This Brief is respectfully submitted by Respondent Joseph E. Seagram & Sons, Inc. ("Seagram" or "Company") in opposition to the Petition for Writ of Certiorari filed by Petitioner, James W. Coleman, Ph.D.[1]

[1] Pursuant to Rule 29.1 of the Supreme Court Rules, Respondent Seagram states that it is a wholly owned subsidiary of The Seagram Company, Ltd., a Canadian corporation.

STATEMENT OF THE CASE

Following a trial on the merits in which Petitioner was represented by counsel and no evidence was denied admission by the court, the District Court held as follows:[2]

> "Based on the evidence of record, plaintiff has not persuaded the court that he suffered intentional discrimination."

(Res. A-8).

Since Petitioner is unable to dispute the District Court's findings of fact and conclusions of law, he distorts and misstates the record in repeatedly contending, as the central point of his petition, that the "Sixth Circuit abused its discretion and/or committed clear and reversible error" in concluding that it found "no abuse of discretion in the district court's rulings on discovery or in the denial of the motion to amend the petition." (Pet. A-6 at 4).

This case arises out of a decision by Seagram to relocate the Research & Development Department that had formally been part of a now-closed production plant in Louisville, Kentucky, to Seagram's new Research and Technology facility in White Plains, New York. As found by the District Court below:

> "Seagram offered all salaried professional employees in Louisville, including Dr. Coleman, the opportunity to transfer to the White Plains facility. Those making the move to White Plains would work there in a position comparable to their previous position in Louisville, with comparable responsibilities, grade level, and salary.
>
> * * * *
>
> Seagram offered relocation allowances and assistance in finding homes in the White Plains area. Seagram paid

---

[2] A copy of the District Court's Memorandum Opinion is attached at Appendix A-1 ("Res. A-1").

> for employees to take trips to New York to locate a new home, offered a cost-of-living adjustment that could be taken in a lump sum after making the move, a buy-out option on the employee's current mortgage and assistance with the employee's new mortgage. In the alternative, those salaried professional employees who elected not to transfer were eligible for a special severance package equal to one month's salary for each year of service with Seagram."

(Res. A-4 to A-5).

Petitioner, who was 55 years old at the time, elected to retire with an early retirement pension and related medical benefits under the Company's pension plan. In addition, in accordance with the special severance plan offered in connection with the move, Petitioner received a severance payment equal to 21-1/2 months of salary. (Res. A-6; R. 173: Stipulation of Facts and Admissibility of Exhibits).

With regard to Petitioner's distortions concerning his "over 21 years" employment by Seagram (Pet. at 1), the District Court found as follows:

> "During his career at Seagram, Dr. Coleman received 25 salary and adjustment increases, resulting in a salary of $52,620 at the time of his retirement in August 1985. . . . Dr. Coleman's 1985 salary was the second highest among the employees at his level (Senior Research Scientist—Grade 18) in the R&D department.
>
> * * * *
>
> His ratings ranged from just below a 3 (or "Good") rating, given when an employee performed "as expected," to a rating of 4 (or "Superior"), given when an employee's performance exceeded expectations. Dr. Coleman's evaluations included written comments that he needed to complete projects in a more timely manner, reduce his backlog of projects, improve his personal

> relationship with personnel at the production plant, and focus more on creative projects and less on routine work."

(Res. A-3).[3]

With regard to Petitioner's claim that he should have been offered a Section Head position in advance of the Department's move from Louisville to White Plains (Pet. at 1-2), the District Court found as follows:

> "Dr. Coleman failed to establish, however, that he was considered and rejected for the Section Head position. . . . Dr. Weber remained in and performed the duties of his position until August 1985. . . . [T]here is no evidence that any meetings or deliberations took place regarding candidates for the position prior to the move.
>
> * * * *
>
> Seagram's proffered justification for waiting until after the move to White Plains before making a decision regarding the Section Head position is that it was waiting until management knew for certain which personnel, qualified for the position, from the Louisville R&D facility would be transferring to White Plains. The evidence offered by plaintiff fails to persuade the court that this justification is merely a pretext for intentional racial discrimination. It would have made little sense in early 1985 for Seagram to expend the time and resources necessary to select a new Section Head. . . . More

---

[3] With regard to Petitioner's contention that he was a "long-time activist in the civil rights movement" (Pet. at 1), the District Court found that:

> "Seagram had in the past strongly supported Dr. Coleman's NAACP activities by providing paid time off to attend NAACP meetings and providing hospitality for the Louisville delegates at the National Convention. . . . Dr. Coleman's participation in NAACP activities took place primarily in the late 1970s."

(Res. A-15).

> specifically, Dr. Coleman's vacillation gave Seagram grounds for pause in making the promotion decision."

(Res. A-11 to A-13).[4]

As to Petitioner's reference to his own testimony concerning what he was allegedly told by Dr. Frederick Weber, his Section Head, (Pet. at 2), these allegations were directly contradicted by the trial testimony of Dr. Weber and James Martin, which the District Court stated carried "great weight with the court." (Res. A-8).

> "Dr. Weber, however, denied that Dr. Bluhm made racist remarks about Coleman. Dr. Weber did criticize Dr. Bluhm's management style. . . . But Dr. Weber made it clear that race was not a factor in the employment actions taken by Dr. Bluhm. He never heard Dr. Bluhm make a racist statement, nor did he observe him make a decision based on race. It was also Dr. Weber's firm understanding that a decision on the new Section Head would not be made until after the move to White Plains.[5]

---

[4] With regard to Petitioner's claim that "an employee with a high school diploma assumed the job responsibilities previously performed by Dr. Weber" (Pet. at 3), the District Court found that:

> "Dr. Weber retired on August 1, 1985. Thereafter, Mr. Jose Puebla, a Junior Scientist, performed some of the responsibilities of a Section Head, but primarily worked to pack away laboratory equipment in preparation for the move to White Plains. . . .When none of the senior staff from the Biotechnology Section elected to make the move, Dr. Bronsky was appointed to the Section Head position on an interim basis. He remained in that position until February 1989 when Seagram appointed Dr. William Hirt to the Section Head position."

(Res. A-6).

[5] As to Petitioner's claim that he saw racist comments in a job-performance evaluation (Pet. at 2), the only specific race-related commentary in the evaluation process to which petitioner has ever pointed is in the Supervisor's Notes, prepared by Dr. Weber, which state that Coleman had "some sensitivity to racial issues." (Plaintiff's Exh. 19-18).

> Mr. James Martin, African-American male, is the Director of Management Services at Seagram's White Plains facility. . . . Like Dr. Coleman, while in Louisville he had been involved in organizations and activities protected by Title VII. . . . Mr. Martin stated that race was never an issue with Dr. Bluhm, and his sole concern was professional performance. Mr. Martin also stated that it was clear to him that a decision on the new Section Head would not be made until the move to White Plains. Mr. Martin never believed that race was a factor in Seagram's actions in regard to Dr. Coleman."

(Res. A-7 to A-9).

Finally, the District Court found as follows with regard to the request Petitioner made for his personnel file while he was still employed by Seagram (Pet. at 2):

> "On or about March 15, 1985 Dr. Coleman requested his personnel file from Dr. Weber. The informal supervisor's file relating to his employment was shown to him, but Dr. Coleman stated that the file was incomplete. . . . Dr. Bluhm brought Dr. Coleman's personnel file from the Human Resources department in New York City for Dr. Coleman to review. Nonetheless, Dr. Coleman wrote . . . to M. W. Griffin, Executive Vice President for Human Resources, requesting additional documents in his file. Mr. Griffin responded that he believed Dr. Coleman had been provided with everything in his personnel file, and that if he was seeking other documents, he needed to identify them specifically. . . . Dr. Coleman responded by stating the types of documents he was seeking. Dr. Coleman was then told that Seagram did not have the documents he requested."

(Res. A-5).[6]

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[6] As to Petitioner's reference to an Equal Employment Opportunity Commission ("EEOC") "letter of right to sue" (Pet. at 3), the District Court found that:

(*footnote continued*)

REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS ON PETITIONER'S DISCOVERY-RELATED MOTIONS.

Based on its review of the record, the Court of Appeals found as follows with regard to Petitioner's discovery-related claims:

> "Although Seagram produced 3000 pages of employment records of Coleman and other employees, Coleman remained convinced that Seagram was withholding records, and filed a number of motions to compel. The district court ultimately determined that Seagram had complied fully with Coleman's discovery requests. . . .
>
> [W]e find no abuse of discretion in the district court's rulings on discovery or in the denial of the motion to amend the complaint. *See Plott v. General Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1196 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1546 (1996); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995)."

(Pet. A-6 at 2-3, 4).

The District Court's discovery rulings are reviewed under an abuse of discretion standard. *Wayte v. United States*, 470 U.S. 598, 624-25 (1985) (Marshall, J., dissenting) ("District Court decisions on discovery are . . . not subject to plenary review on appeal, but instead are reviewed under an abuse-of-discretion standard.") Similarly, a related motion to compel or for sanctions for alleged failure to comply is also reviewed

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> "On September 11, 1985 Dr. Coleman filed a Complaint of Discrimination asserting essentially the same claims that are the subject of the present action. . . . After conducting its own investigation, . . . the EEOC issued its determination that there was not probable cause to believe that Dr. Coleman's allegations were true."

(Res. A-6).

for abuse of discretion. *See, e.g., Harris v. Chipman*, 97 F.3d 499, 506 (11th Cir. 1996); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 929 (4th Cir. 1995); *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1021 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). Finally, as stated by the Sixth Circuit in *Plott v. General Motors Corp., Packard Elec. Div.*, 71 F.3d 1190 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1546 (1996), the relevant factors applicable to the review of discovery orders include: (i) when the appellant learned of the issue; (ii) whether the desired discovery would have changed the rulings; (iii) how long discovery lasted; (iv) whether the appellant was dilatory in his discovery efforts, and (v) the responsiveness of the appellee to discovery requests. *Id.* at 1196-97.

The record below is clear that the District Court did not limit Petitioner's scope of discovery, nor did Seagram request such a limitation. Rather, during the nine-year course of this litigation—and more than six years of discovery—Seagram produced over 3,000 pages of documents, including personnel and personnel policy documents related to Petitioner's employment with Seagram and the personnel files of other employees in the R&D Department whose files were requested by Petitioner; responded to multiple interrogatories and a request for admissions regarding the produced documents; and produced four managers and former managers for depositions by Petitioner's counsel.[7]

---

[7] (R. 49, 55: Deposition of Frederick Weber taken on October 1, 1991 and October 10, 1991; R. 126: Deposition of José Puebla taken on September 15, 1989; R. 127, 130, 132: Deposition of Leslie Bluhm taken on May 10, 1989, September 12, 1989, and September 14, 1989; R. 128-29: Deposition of Robert Cherundolo taken on September 13, 1989 and September 14, 1989; R. 131, 133-35: Deposition of Albert Bronsky taken on May 12, 1989 and September 11, 1989). More specifically, in response to Plaintiff's First Set of Document Requests, served in June 1988, Seagram gathered and forwarded to Plaintiff all performance and employment documents regarding Plaintiff after completing a diligent search of Company records. (R.12: Responses and Objections by Defendant to

In addition, in response to Petitioner's three Motions to Compel, Seagram submitted affidavits of its in-house counsel and outside counsel swearing to Seagram's good faith search for, and production of, all of the requested documents which it had in its possession or control. *See* Affidavit of Ann Giambusso, sworn to on September 15, 1993 (attached at Appendix A-18). Finally, contrary to the Petitioner's repeated claim to the contrary, the District Court directed Seagram, in response to Petitioner's First and Second Motions To Compel, to produce any documents not already produced and, in addition, directed Seagram to produce for inspection the personnel files of current and former Seagram employees, copies of

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Plaintiff's Interrogatories and Responses and Objections to Plaintiff's Request for the Production of Documents). In connection with Plaintiff's deposition of two of Defendant's employees, Dr. Leslie Bluhm and Mr. Robert Cherundolo, in 1989 Defendant produced additional documents, including documents describing Defendant's policies and procedures concerning employee evaluations and merit reviews in effect during Plaintiff's employment with the Company. On September 19, 1990, Plaintiff filed the first of his three Motions to Compel the production of documents that he believed should be in Seagram's files. (R. 31: Motion by Plaintiff to Compel Discovery). On April 11, 1991, Plaintiff served his Second Set of Interrogatories and Request for Production of Documents in response to which Defendant produced an additional 1,887 pages of documents. On April 19, 1992, Plaintiff filed a Motion to Propound in Excess of Thirty Requests for Admissions. (R. 57: Plaintiff's Motion to Propound Requests for Admissions in Excess of 30). On January 30, 1993, Plaintiff served his Second Motion to Compel Discovery. (R. 76: Motion by Plaintiff to Compel). By an Order dated February 3, 1993, Plaintiff's Motion to Propound in Excess of Thirty Admissions was granted and Seagram's Motion to Terminate Discovery was denied. (Pet. A-3). On April 26, 1993, Plaintiff served a Third Motion to Compel and a Motion to Propound In Excess of Thirty Interrogatories and Request for Production of Documents. (R.93: Third Motion by Plaintiff to Compel Discovery). By Order dated June 11, 1993, the Magistrate Judge directed Defendant to produce for inspection the personnel records of certain listed former and current Seagram employees, in response to which Defendant uncovered no additional documents in its fourth search of Company facilities, but nevertheless again produced all documents responsive to the Order. (Pet. A-4).

which had already been produced to Petitioner. (Pet. A-4). Only after Seagram's compliance with this order did the court deny Petitioner's motion to impose sanctions on the Defendant, because"[a] review of the record convinces this Court that the defendant has made every effort to comply with Coleman's discovery requests and as such, sanctions [are] inappropriate."[8] (Pet. A-5 at 2).

In addition, while Petitioner is correct in stating that it was Seagram's policy to conduct an annual evaluation of each employee on Seagram's performance evaluation form (the "Blue Book") to be maintained in Seagram's official personnel files in New York City, Dr. Weber testified at trial, in response to a question of whether he prepared a "Blue Book" on every employee every year, that he only did that "when we were forced into it." (R. 179: Transcript of trial testimony, May 31, 1995, at 61). Dr. Weber also testified that he did not fill out the sections of the "Blue Book" concerning promotability for Petitioner or for any other employees, and that he usually did not fill out a complete "Blue Book" on anybody while he was Section Head. (R. 179: Transcript of trial testimony, May 31, 1995, at 69). Indeed, an Exhibit prepared by Petitioner indicates that the official personnel files of all of the employees who worked in the Louisville R&D Department are deficient in that they do not have performance reviews for each year of the employee's tenure and, in the case of a number of employees, do not include any "Blue Book" reviews at all. (Defendant's Exh. 58).

Finally, Petitioner is in error when he states that the District Court did not allow him to discover certain of Seagram's per-

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[8] In fact, the only discovery motions brought by Petitioner that were denied by the District Court were a Motion for Ruling on Discovery Omissions (which the court found sought a ruling on certain aspects of a previously filed Motion to Compel) and a Motion for Leave to Propound in Excess of 30 Interrogatories made after Defendant had already responded to Plaintiff's First and Second Set of Interrogatories. (Pet. A-5 at 1-2).

sonnel policies and procedures. (Pet. at 18-19). Rather, Seagram produced the requested policy and procedural documents it had in its possession and control in connection with Petitioner's deposition of two of Defendant's managers. (*See* fn. 7, *supra*). Also, Seagram's counsel swore in Affidavits submitted in response to Coleman's Motions to Compel that Seagram did not have a separate Personnel Manual in effect after 1983, and that a thorough search for other requested personnel policy documents had been undertaken and that no further documents had been found. (Res. A-20 at ¶ 7).[9]

While Petitioner claims that all of the foregoing and the District Court's ultimate conclusion that Seagram had made every effort to comply by producing those documents which were within its possession and control, is unsatisfactory, and does not support the Court of Appeal's conclusion that "the District Court ultimately determined that Seagram had complied fully with [Petitioner's] discovery requests" or its finding "no abuse of discretion in the district court's rulings on discovery" (Pet. at 14-16), the Court of Appeals was clearly correct in this regard. The District Court ultimately determined that Seagram had been responsive in both its search for documents which could have existed and its production of all documents under its possession and control, and that, therefore, Seagram had complied fully with the discovery requests

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[9] Plaintiff's reference to "redacting discoverable job-related documents" (Pet. at 17-18) refers to documents describing a research project which was produced to Petitioner as part of the additional employee personnel files Petitioner had requested. (Plaintiff's Exh. 44). The redacted portions of this document contain confidential business, not personnel, information and neither Petitioner nor his counsel ever made a specific request for unredacted copies of that document. Similarly, despite Petitioner's reference to an alleged withholding of his "promotability evaluations under a scheme of 'privilege documents' " (Pet. at 11), the only document withheld by Seagram on the grounds of privilege during the entire discovery process was an early draft of Seagram's response to the EEOC in connection with Petitioner's Charge, which had been inadvertently filed with Petitioner's personnel documents. (Res. A-20 at ¶ 5).

and was not subject to sanctions by the Court to compel production of what it did not have.[10]

II. PETITIONER'S CLAIMS REGARDING HIS MOTION TO AMEND HIS COMPLAINT TO ADD A STATE LAW CLAIM FOR EMOTIONAL AND MENTAL DAMAGES, AND HIS MOTION TO RECONSIDER HIS CONSTRUCTIVE DISCHARGE CLAIM, HAVE BEEN MADE MOOT BY THE FINDINGS OF THE DISTRICT COURT, AFFIRMED BY THE COURT OF APPEALS, THAT SEAGRAM DID NOT INTENTIONALLY DISCRIMINATE OR RETALIATE AGAINST PETITIONER ON THE BASIS OF HIS RACE.

Petitioner's claims in his Petition regarding his alleged constructive discharge and his motion to amend his complaint more than five (5) years after the commencement of his lawsuit to add a claim for emotional and mental injuries pursuant to the Kentucky Civil Rights Act (Pet. at 19-28) are directly related to, and dependent upon, his unfounded allegations regarding the District Court's discovery rulings which the Court of Appeals properly found were not an abuse of discretion by the lower court. However, these claims are also made moot by the District Court's holdings following a trial on the merits that Petitioner had not demonstrated that he suffered intentional racial discrimination or retaliation, which holdings Petitioner does not substantively contest in his Petition.[11]

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[10] There is no support in the record for Petitioner's claim of "exception [sic] public interest in the civil-rights community" for his discovery claims. (Pet. at 28).

[11] Petitioner's claim that the courts below did not address his claims of discrimination concerning job performance standards (Pet. at 27-28) is similarly deficient. In addition to holding that "based on the evidence of record, plaintiff has not persuaded the court that he suffered intentional discrimination" (Res. A-8), the District Court expressly found that:

(*footnote continued*)

As stated by the 6th Circuit in *Lynch v. Freeman*, 817 F.2d 380, 385 (6th Cir. 1987), "[a] determination of constructive discharge necessarily rests on a finding of discriminatory intent. The district court found no such intent and this finding is not clearly erroneous." *Id.* at 385. Furthermore, in addition to finding a lack of proof of intentional discrimination or retaliation, the District Court made specific findings of fact that Seagram encouraged all of its professional employees in the Louisville R&D department, including Petitioner, to move with the department to White Plains and guaranteed those employees positions with comparable responsibilities, grade level, and salary. The District Court also specifically found that Seagram's decision to wait until after the move to White Plains before making a decision regarding the selection of a new Section Head was both understandable and reasonable under the circumstances. (Res. A-12 to A-13). These are clearly not circumstances where a finding of constructive discharge would be appropriate, even where there had been a finding of intentional discrimination not present here. *See, e.g., Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991) (finding that the offer to an employee of other legitimate options within the company for continued employment "precludes a finding that [he] was constructively discharged."); *Darnell v. Campbell Cty. Fiscal Court*, 731 F. Supp. 1309, 1313 (E.D.Ky. 1990), *aff'd*, 924 F.2d 1057 (6th

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> "Dr. Coleman failed to establish that Seagram took an employment action adverse to him. The only conduct of Seagram that is actionable is that which falls within the 300-day window prior to the filing of the complaint with the EEOC. The only conduct of Seagram falling within that period relates to its failure to promote Dr. Coleman to the Section Head position. As noted above, Seagram did not make a final determination regarding who would permanently fill the Biotechnology Section Head position until after the move to White Plains had been completed. Nor did the actions of Seagram or Bluhm constitute any sort of de facto rejection of his application."

(Res. A-14).

Cir. 1991). In addition, the finding by the District Court that Petitioner has not proven intentional discrimination or retaliation makes the subject of what, if any, remedies (*e.g.*, emotional and mental damages) Petitioner might have been entitled to as a result of such discrimination moot.

Furthermore, even if Petitioner's appeal of the denial of his motion to amend were not moot, the Court of Appeals found "no abuse of discretion in the district court's . . . denial of the motion to amend the complaint." (Pet. A-6 at 4). *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995).

In evaluating the appropriateness of a motion to amend, the court may consider undue delay of filing, lack of notice to the opposing party, bad faith by the moving party, undue prejudice to the opposing party, and futility of amendment. *See Foman v. Davis*, 371 U.S. 178-182 (1962); *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1130 (6th Cir. 1990). In denying the Petitioner's Motion to Amend, the Magistrate Judge noted that Petitioner offered "no explanation for this extraordinary delay" and that "the amended complaint does not contain any factual allegations that were not known to the Plaintiff when the original complaint was filed in 1987." (Pet. A-3 at 2-3). The Magistrate Judge also found that Seagram would be unduly prejudiced because, at this late date, it would be required to re-depose a plaintiff who was claiming discrimination several years previously, as well as other witnesses whose memories concerning the Petitioner's demeanor "would now be long faded . . . ." (*Id.* at 5). Accordingly, the Magistrate Judge concluded that not only was Petitioner's delay unjustified, it unfairly prejudiced the defendant." (*Id.* at 4-5).

Thus, as stated by the Magistrate Judge in his Order denying Petitioner's Motion to Amend—and in his Order denying Petitioner's Motion for Reconsideration related, *inter alia*, to

his claims regarding document discovery[12] (Pet. A-4 at 1-3)—substantial prejudice to Seagram, undue delay, lack of notice and bad faith by Petitioner all militated against permitting Petitioner to amend his five year old complaint to add a time-barred claim for emotional and mental damages, which was particularly within the control of the Petitioner. Therefore, the Orders of the Magistrate Judge denying Petitioner's Motion to Amend did not constitute an abuse of discretion.

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[12] The Petitioner again contends in his Petition that discovery of further documents was necessary before he could file a motion to amend his complaint to add a claim for emotional and mental damages (Pet. at 21-22), despite the fact that he had not seen those documents. (*See* Pet. A-4 at 3; fn. 5, *supra*).

CONCLUSION

It is submitted for all of the reasons set forth herein that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 87-0022-L(R)
Filed: June 29, 1995

JAMES W. COLEMAN, PH.D.,

Plaintiff,

—v.—

JOSEPH E. SEAGRAM & SONS, INC.

Defendant.

MEMORANDUM OPINION

This is a racial discrimination case filed under Title VII. A bench trial was held on May 30 and 31, 1995. For the reasons that follow, the court concludes that judgment must be entered for the defendant.

FINDINGS OF FACT

Prior to commencing work for Defendant Joseph E. Seagram & Sons, Inc. ("Seagram"), Plaintiff James W. Coleman ("Dr. Coleman"), an African-American, had attained both

a bachelor's degree from Tougaloo College and a master's degree from Tuskegee Institute. Dr. Coleman had worked as a bacteriological technician for the Air Force and as an instructor at Tuskegee Institute. Dr. Coleman was first hired by Seagram in September 1964. He was initially paid an hourly wage as a Production Trainee at Seagram's Lawrenceburg, Indiana production facility. Dr. Coleman continued to work there as Yeast Chemist until September 7, 1965.

Dr. Coleman then began working at Seagram's Research and Development ("R&D") facility in Louisville, Kentucky. Still working for an hourly wage, Dr. Coleman worked in the Biotechnology Section. Dr. Coleman worked at the Louisville R&D facility for the remainder of his career with Seagram, and received a number of promotions. In September 1965 he was promoted to Central Research Supervisor, a wage position. Dr. Coleman was then promoted to a salaried position as an Associate Scientist in November 1966. In December 1967 Dr. Coleman began work as a Senior Associate Scientist. He remained in that position until January 1973, when he was made a Research Scientist. In January 1977 he was promoted to Senior Research Scientist, a position he held until the end of his career with Seagram in August 1985. The position above Senior Research Scientist, the highest position in the Biotechnology Section, was the Section Head position.

Dr. Coleman received his Ph.D. in Microbiology from the University of Louisville in 1972. Seagram fully reimbursed Dr. Coleman for his tuition and periodically afforded him paid time off to enable him to complete his thesis on a subject related to his work for Seagram. Dr. Coleman's articles on the subject of grain alcohol fermentation have been published in scientific journals. Dr. Coleman also holds memberships in various scientific organizations, and has taught at the University of Louisville.

Dr. Coleman was actively involved with the activities of the NAACP throughout most of his career at Seagram. His participation was a matter of general knowledge at the Louisville R&D facility. Dr. Coleman took paid time off to attend NAACP national conventions in the mid-1970s, and Seagram

authorized Dr. Coleman to provide hospitality to the Louisville delegation at certain of the conventions.

Dr. Albert Bronsky was the Section Head of the Biotechnology Section from 1968 to 1975, and was thus Dr. Coleman's immediate superior, advised Dr. Coleman that he needed to receive a series of superior ratings in order to get promoted. On December 22, 1976 Dr. Coleman sent a letter to Dr. S.L. Adams to Seagram's offices in New York. This letter requested a review of Dr. Bronsky's determination that Dr. Coleman's performance did not warrant a promotion to Senior Research Scientist. Dr. Coleman's actions were effective, and he received that promotion as of January 1977.

During his career at Seagram, Dr. Coleman received 25 salary and adjustment increases, resulting in a salary of $52,620 at the time of his retirement in August 1985. These increases came at intervals of approximately one year. Dr. Coleman's 1985 salary was the second highest among the employees at his level (Senior Research Scientist–Grade 18) in the R&D department, but was less than that of employees at higher level managerial positions. As a basis for comparison, as Section Head (Grade 21) Dr. Weber's 1985 salary was $57,060. Two other Senior Research Scientists, Dr. Welden Maisch and Dr. Ping Wang, were paid $48,180 and $44,700 respectively.

Dr. Coleman's salary increases were based in part on performance evaluations and merit reviews given during his last ten years of employment with Seagram. His ratings ranged from just below a 3 (or "Good") rating, given when an employee performed "as expected," to a rating of 4 (or "Superior"), given when an employee's performance exceeded expectations. Dr. Coleman's evaluations included written comments that he needed to complete projects in a more timely manner, reduce his backlog of projects, improve his personal relationship with personnel at the production plant, and focus more on creative projects and less on routine work.

Dr. Fred Weber was Section Head for the Biotechnology Section from March 1975 until his retirement in August 1985. Dr. Weber, the other Section Heads at the R&D facility, and

Mr. James Martin as Research Administrator, reported to the Vice President for Research and Development, Dr. Leslie Bluhm. In December 1982 Seagram discontinued its bottling operations at the Louisville plant, and closed the production facility in the Spring of 1983. Then in early 1984 Dr. Weber made it known that the would retire when he became 62 years of age in February 1985. Dr. Coleman's interest in the position was either generally known to Seagram management or made known to them by his expression of interest.

In the latter part of 1984, Seagram announced that the R&D Department would be relocating to its facility in White Plains, New York and consolidated with Seagram's New Products Development operation that had been located in Hawthorne, New York. Dr. Weber indicated that he would not be transferring to White Plains, and elected to retire in August 1985.

Seagram offered all salaried professional employees in Louisville, including Dr. Coleman, the opportunity to transfer to the White Plains facility. Those making the move to White Plains would work there in a position comparable to their previous position in Louisville, with comparable responsibilities, grade level, and salary. Seagram did not offer individual employees promotions as an inducement to get them to move to White Plains. Certain employees did, however, receive promotions either in the ordinary course of Seagram's promotion process or as a reward for extraordinary achievement. For example, in November 1984 Mr. Hugh Mason was promoted to Research Engineer and in February 1985 Ms. Althea Jones was promoted to Junior Scientist. Ms. Jones' promotion came after she received a highly favorable letter regarding her work on a special project, and was requested by her so that she would be able to make the move to White Plains.

Seagram offered relocation allowances and assistance in finding homes in the White Plains area. Seagram paid for employees to take trips to New York to locate a new home, offered a cost-of-living adjustment that could be taken in a lump sum after making the move, a buy-out option on the employee's current mortgage and assistance with the employee's new mortgage. In the alternative, those salaried

professional employees who elected not to transfer were eligible for a special several package equal to one month's salary for each year of service with Seagram. This option was no longer available after an employee moved to the White Plains facility.

A letter dated March 14, 1985 was sent to Dr. Coleman and other professional employees urging them to transfer to White Plains, and requesting that their intentions be indicated to Dr. Bluhm or James Martin by March 22, 1985. Of the employees in the Biotechnology Section, only Althea Jones, Jose Puebla, and James Ervin, all Junior Scientists, transferred to White Plains. On or about March 15, 1985 Dr. Coleman requested his personnel file from Dr. Weber. The informal supervisor's file relating to his employment was shown to him, but Dr. Coleman stated that the file was incomplete. In May 1985 Dr. Bluhm brought Dr. Coleman's personnel file from the Human Resources department in New York City for Dr. Coleman to review. Nonetheless, Dr. Coleman wrote a letter dated May 31, 1985 to M. W. Griffin, Executive Vice President for Human Resources, requesting additional documents in his file. Mr. Griffin responded that he believed Dr. Coleman had been provided with everything in his personnel file, and that if he was seeking other documents, he needed to identify them specifically. On June 20, 1985 Dr. Coleman responded by stating the types of documents he was seeking. Dr. Coleman was then told that Seagram did not have the documents he requested.

On March 22, 1985, in response to an oral question to him by Mr. Martin, Dr. Coleman stated that he would be transferring to White Plains. It was brought to his attention at some point later in the day that, under Seagram's move incentive program, an employee who accepted the move incentives but later chose not to transfer to White Plains would not be eligible for the special severance package. Interested in preserving his right to elect to receive the severance package, Dr. Coleman sent a handwritten letter dated March 22, 1985 to Dr. Bluhm and Mr. Martin stating that would not be transferring to the White Plains facility. Dr. Coleman's decision

was also apparently based on his desire to see more information from his personnel file in order to gauge the likelihood that would be promoted to the Section Head position, either before or after the move to White Plains was completed. Dr. Coleman also considered the personal and financial aspects of relocating to White Plains, New York. By 1985, Dr. Coleman had lived in Louisville for approximately 25 years, and his wife had developed a successful career as a real estate broker. The Colemans also owned four fourplexes comprising 16 rental units.

Dr. Weber retired on August 1, 1985. Thereafter Mr. Jose Puebla, a Junior Scientist, performed some of the responsibilities of a Section Head, but primarily worked to pack away laboratory equipment in preparation for the move to White Plains. Seagram did not make a decision regarding who would fill the Biotechnology Section Head position on a permanent basis until it was clear which employees would transfer to the White Plains facility. When none of the senior staff from the Biotechnology Section elected to make the move, Dr. Bronsky was appointed to the Section Head position on an interim basis. He remained in that position until February 1989 when Seagram appointed Dr. William Hirt to the Section Head position.

On August 19, 1985, Dr. Coleman submitted a letter to Dr. Bluhm stating that he would separate from Seagram effective August 31, 1985. In accordance with the special severance package offered in connection with the move to White Plains, Dr. Coleman received payments equal to $21\frac{1}{2}$ months of salary, and continued coverage under the Seagram Group Insurance Program. On September 11, 1985 Dr. Coleman filed a Complaint of Discrimination asserting the same claims that are the subject of the present action. On December 19, 1985 this Complaint was directed to the federal Equal Employment Opportunity Commission ("EEOC"). After conducting its own investigation, on October 10, 1986 the EEOC issued its determination that there was not probable cause to believe that Dr. Coleman's allegations were true.

At trial Dr. Coleman testified that part of his personnel file contained racist comments. He stated that Dr. Weber had told him that Dr. Bluhm had made racist comments in his evaluations. He further testified that Dr. Weber had told him that the Dr. Bluhm had forced him to put negative comments in Dr. Coleman's personnel file. Dr. Coleman also indicated that Dr. Weber told him that Dr. Bluhm had made racist comments about Dr. Coleman and that Dr. Coleman would not get the job of Section Head. He was also displeased that Seagram had taken his picture and used it without his permission for articles appearing in The Louisville Defender newspaper, Ebony magazine, and minority recruitment literature for Seagram. Dr. Coleman complained to management staff at Seagram that he was offended by this activity. Dr. Weber was Dr. Coleman's supervisor during Dr. Coleman's entire career at Seagram. Dr. Weber, however, denied that Dr. Bluhm had made racist remarks about Coleman. Dr. Weber did criticize Dr. Bluhm's management style, but did not feel that Dr. Bluhm made employment decisions on the basis of race.

Mr. James Martin, an African-American male, is the Director of Management Services in White Plains. He previously worked in the Louisville production facility and then transferred to R&D in 1983. Currently he is involved with Associated Managers, an association of African-American employees at Seagram whose purpose is to act as an advocate for African-American recruitment, promotion, and training.

Mr. Martin stated that the Louisville employees were informed that no decisions regarding promotions would be made until the move to White Plains was completed. Mr. Martin believes that Dr. Coleman and Dr. Bluhm had a conflict. Mr. Martin saw no evidence that the conflict concerned race. In Mr. Martin's opinion, race was never an issue with Dr. Bluhm. Dr. Bluhm was primarily concerned with professional qualifications and performance.

CONCLUSIONS OF LAW

This is a racial discrimination case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

(1992). This court has jurisdiction under the general federal question statute, 28 U.S.C. § 1331 (1992).

This case poses a dilemma. The court is faced with a well-educated and articulate plaintiff whom in good faith believes that because of his race he has suffered job-relation discrimination. Dr. Coleman was obviously well qualified for the Section Head position. However, the court must judge the case on the evidence presented. Based on the evidence of record, plaintiff has not persuaded the court that he suffered intentional discrimination. *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2749-54, 125 KL.Ed.2d407 (1993). This conclusion is not critical of the credibility of the plaintiff.

The testimony of Dr. Fred Weber and Mr. James Martin offers a different perspective and carries great weight with the court. Dr. Fred Weber, a Caucasian male, retired as Section Head of Biotechnology in 1985. He had worked with Dr. Coleman during his entire tenure at Seagram. As the time of trial he had been retired for 10 years and had no real ties or allegiance to Seagram. He was critical as he was supportive of some of the management decision at Seagram. He stated things changed at Seagram when Dr. Bluhm became his immediate supervisor. Dr. Bluhm was a poor manager of people. Dr. Bluhm had a tendency to yell and criticize rather than counsel. Dr. Weber had many criticisms of Dr. Bluhm's management style and felt that Dr. Bluhm had a difficult and caustic personality. But Dr. Weber made it clear that race was not a factor in the employment actions taken by Dr. Bluhm. He never heard Dr. Bluhm make a racist statement, nor did he observe him make a decision based on race. It was also Dr. Weber's firm understanding that a decision on the new Section Head would not be made until after the move to White Plains.

Mr. James Martin, African-American male, is the Director of Management Services at Seagram's White Plains facility. He had previously worked in Louisville, first with the production facility and thereafter in R&D in 1983. Like Dr. Coleman, while in Louisville he had been involved in organizations and activities protected by Title VII. He is cur-

rently the president of Associated Managers, an organization of African-American managers employed at Seagram which works as an advocacy group to ensure fair promotion and training opportunities and practices for African-Americans at Seagram. Mr. Martin was aware that tension existed between Dr. Coleman and Dr. Bluhm and that it seemed to involve the issue of promotional opportunities. Mr. Martin stated that race was never an issue with Dr. Bluhm, and his sole concern was professional performance. Mr. Martin also stated that it was clear to him that a decision on the new Section Head would not be made until the move to White Plains. Mr. Martin never believed that race was a factor in Seagram's actions in regard to Dr. Coleman. Like the court, Mr. Martin did not question Dr. Coleman's good faith belief that race had adversely influenced employment decisions regarding Dr. Coleman. However, Mr. Martin saw no objective evidence to support Dr. Coleman's belief.

The facts of his case do not present the kind of "continuing violation" necessary to toll the statute of limitations. Nevertheless, conduct occurring outside the 300-day limitations period imposed by Title VII, while not actionable itself, "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Such evidence was admitted for the purpose of determining whether otherwise apparently race-neutral actions were, in fact, motivated by racial animus. As plaintiff's motion for reconsideration of the court's prior order granting summary judgment for defendant on plaintiff's claim for constructive discharge was denied from the bench, only claims for retaliatory discrimination and failure to promote remain.

Title VII provides, in pertinent part:

§ 2000e-2. Unlawful employment practices.

(a) It shall be an unlawful employment practice for an employer

> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . .

A. FAILURE TO PROMOTE

In a Title VII case, the plaintiff bears the initial burden of establishing a prima facie case by a preponderance of the evidence. *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 548 (6th Cir. 1991). When asserting that the employer failed to promote the plaintiff based, at least in part, by impermissible considerations of race, the plaintiff's prima facie case requires a demonstration that 1) he is a member of protected class, 2) he was qualified and applied for the promotion, 3) he was considered and rejected for the promotion, and 4) after his rejection the position remained open and the employer continued to seek applicants from persons with qualifications similar to that of plaintiff. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir. 1984).

If the plaintiff carries this burden, it is then incumbent upon the defendant employer to articulate some legitimate, nondiscriminatory reason for the adverse employment determination. *McDonnell Douglas*, 411 U.S. at 802. Once the employer does so, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were merely a pretext for discrimination. A reason cannot be a pretext unless it is shown both that the reason was false and that discrimination was the real reason for the employer's action. *Hicks*, 113 S.Ct. at 2749-54. The burden of persuasion that the plaintiff was the victim of intentional discrimination remains at all times with the plaintiff. *Texas Dep't of Community Affairs v. Burdine*, 540 U.S. 248, 253 (1981).

Dr. Coleman, an African-American, is a member of a protected class. Dr. Coleman was also well qualified for the Section Head position. He had extensive experience in the Biotechnology area, and had performed very well throughout

his career at Seagram. Had Dr. Coleman chosen to transfer to White Plains, he would have been the only Senior Research Scientist in Biotechnology to do so, and his experience and credentials would have established him as the front-runner for that position. The testimony of Dr. Weber and James Martin confirms the court's conclusion in this regard.

Dr. Coleman has also met his burden of demonstrating that he "applied" for the Section Head position. The practice at Seagram did not generally require a formal application from current Seagram employees for openings in salaried, professional positions. Where possible, Seagram's policy was to try and fill such openings by an internal search process, finding and promoting qualified applicants from within the company's current employees. Seagram employees periodically completed a form expressing their interest in certain positions should promotion opportunities arise. Rather than completing an application each time an opening arose, this form and word of mouth were used to determine who was interested in a new opening. Through this form, Seagram's own promotion procedures, and other expressions of interest by Dr. Coleman, it is clear that Dr. Coleman effectively applied for the Section Head opening created by Dr. Weber's retirement.

Dr. Coleman failed to establish, however, that he was considered and rejected for the Section Head position. While no doubt Seagram realized that it would need to fill the opening created by Dr. Weber's retirement, Dr. Weber remained in and performed the duties of his position until August 1985. Thereafter Dr. Bronsky acted as Biotechnology Section Head on an interim basis during the transition to White Plains and until a permanent replacement was found. Seagram may have considered Dr. Coleman a likely candidate for promotion to that position. But there is no evidence that any meetings for deliberations took place regarding candidates for the position prior to the move. In addition, no final decision regarding Dr. Weber's successor was made until well after the move to White Plains, when Dr. Hirt was placed in that position in 1989. There is no indication from the facts presented that Dr. Coleman was rejected as a viable candidate at any time before

he submitted his letter of resignation in August 1985. Dr. Coleman relies heavily on some negative statements made by Dr. Bluhm or Dr. Weber in his earlier performance evaluations to assert that Dr. Bluhm would have blocked his promotion in any event. Those statements, however, neither demonstrate any racial animus on the part of Dr. Bluhm toward Dr. Coleman nor are they sufficient to establish a de facto rejection of Dr. Coleman's application. The statements contain ordinary, business-related matters such as timely completion of projects, ability to deal effectively with subordinate employees and aggressive leadership ability. Furthermore, subsequent evaluations were more favorable to Dr. Coleman.

Dr. Coleman filed as an exhibit an advertisement by Seagram which Dr. Coleman took as a rejection. Dr. Coleman also stated he had seen another advertisement in a trade journal seeking applicants for the Section Head position, but he was unable to find it and thus was unable to produce it at trial. The advertisement he was able to present at trial does not constitute a rejection of Dr. Coleman for the position. Absent some more concrete act or evidence demonstrating that he had been rejected by Dr. Bluhm or Seagram management, Dr. Coleman has failed to prove that he was rejected by Seagram.

Even if the failure of Seagram to make a decision regarding the Section Head position until after the move were itself considered an "adverse employment decision" under the *McDonnel Douglas* analysis, Dr. Coleman would still fail to establish a violation of Title VII. Seagram did seem to fill the Section Head position after the move to White Plains, and considered applicants of Dr. Coleman's qualifications, thus satisfying the fourth element of the *McDonnell Douglas* analysis.

Seagram's proffered justification for waiting until after the move to White Plains before making a decision regarding the Section Head position is that it was waiting until management knew for certain which personnel, qualified for the position, from the Louisville R&D facility would be transferring to White Plains. The evidence offered by plaintiff fails to persuade the court that this justification is merely a pretext for intentional racial discrimination. It would have made little

sense in early 1985 for Seagram to expend the time and resources necessary to select a new Section Head, an upper level managerial position, if there was any significant risk that the person selected would not be working at the White Plains facility. The evidence strongly indicates that Seagram had difficulty in getting the senior staff, particularly in the Biotechnology Section, to make a decision regarding their plans to transfer. Most of these persons had strong ties to the Louisville area, were older and did not want to relocate at this point in their lives. Dr. Bluhm's letter of March 15, 1985 requesting an indication from eligible staff within two weeks came after the staff remained noncommittal more than six months after the initial announcement that the Louisville facility would be closed. Indeed, only three people in the Biotechnology Section elected to transfer, and all these were below the Senior Research Scientist and Research Scientist grade level. More specifically, Dr. Coleman's vacillation gave Seagram grounds for pause in making the promotion decision. On March 22, 1985 Dr. Coleman gave a verbal indication that he would transfer and a written indication that he would not. Given that his stated concern at the time was in protecting his right to take the special severance package, Seagram had legitimate reason to doubt whether Dr. Coleman would move to White Plains.

Because Dr. Coleman has both failed to demonstrate that Seagram rejected him for the Section Head position and failed to prove that the justifications offered by Seagram are mere pretexts for intentional racial discrimination, Dr. Coleman's claim for failure to promote must be dismissed.

B. RETALIATORY DISCRIMINATION

A claim for retaliation has the same sequence and burden of proof as an intentional discrimination case. *Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1134 (6th Cir. 1990); *Smith v. City of Dayton*, 830 F.Supp. 1066, 1076 (S.D. Oh. 1993). The plaintiff must establish a prima facie case by showing that 1) plaintiff engaged in an activity protected by Title VII, 2) the exercise of his civil rights was known by the

defendant, 3) thereafter, the defendant took an employment action adverse to the plaintiff, and 4) there was a causal connection between the protected activity and the adverse employment action. *Christopher v. Strouder Memorial Hospital*, 936 F.2d 870, 877 (6th Cir.), *cert. denied*, ___ U.SA. ___, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991). If the plaintiff proves these elements by a preponderance of the evidence, the defendant must then articulate a legitimate non-retaliatory justification for its action. If the defendant does so, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the articulated justification was, in fact, merely a pretext for intentional retaliation. The burden of persuasion remains with the plaintiff at all times.

During his career at Seagram, Dr. Coleman actively participated in the activities of the NAACP at both the national and local levels. In addition, Dr. Coleman periodically spoke out on his own behalf and on the behalf of other African Americans at Seagram in an effort to ensure equal treatment for them in their compensation and terms and conditions of employment at Seagram. This activity is the kind of activity that Title VII was designed to protect. In addition, Seagram employees, both Dr. Coleman's peers and his superiors in managerial positions, were well aware of his involvement and activities. Dr. Coleman thus has satisfied the first two elements of his prima facie case.

However, Dr. Coleman failed to establish that Seagram took an employment action adverse to him. The only conduct of Seagram that is actionable is that which falls within the 300-day window prior to the filing of the complaint with the EEOC. The only conduct of Seagram falling within that period relates to its failure to promote Dr. Coleman to the Section Head position. As noted above, Seagram did not make a final determination regarding who would permanently fill the Biotechnology Section Head position until after the move to White Plains had been completed. Not did the actions of Seagram or Bluhm constitute any sort of de facto rejection of his application.

Likewise, Dr. Coleman failed to demonstrate any causal connection between adverse employment action and Dr. Cole-

man's participation in NAACP activities. And, as noted above, even assuming that Seagram's decision to delay filling the Section Head opening is itself actional under Title VII as an "adverse employment determination," the evidence does not support the conclusion that this decision was made as a way to retaliate against Dr. Coleman. First, Seagram had in the past strongly supported Dr. Coleman's NAACP activities by providing paid time off to attend NAACP meetings and providing hospitality for the Louisville delegates at the national convention. James Martin also testified that Seagram currently supports his activities to promote minority interests at Seagram. Second, Seagram's articulated justification for delaying that decision, to determine which Seagram employees for Louisville's R&D facility transfer to White Plains, support the conclusion that it was that consideration rather than a desire to retaliate against Dr. Coleman that caused the delay in making the promotion decision. Dr. Coleman has also failed to demonstrate that this articulated justification is just a pretext for discrimination. Finally, Dr. Coleman's participation in NAACP activities took place primarily in the late 1970s. The sheer passage of time renders it unlikely that an employment decision made in the mid-1980s was caused by Dr. Coleman's conduct so many years before. While not controlling, the "temporal link" between the protected activity and the adverse employment decision is strong evidence of whether a causal connection between the two exists. *Holland v. Jefferson National Life Insurance Co.*, 883 F.2d 1307, 1315 (7th Cir.); *Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 627 (11th Cir. 1983).

Because Dr. Coleman has both failed to demonstrate that Seagram took adverse employment action against him and failed to prove that there was any causal connection between Seagram's conduct and protected activity, Dr. Coleman's claim for retaliatory discrimination must be dismissed. An appropriate order shall be entered.

This the 26th day of June, 1995.

/s/ THOMAS B. RUSSELL
Judge, U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 87-0022-L(R)
Filed: June 27, 1995

JAMES W. COLEMAN, Ph.D.,

Plaintiff,

—v.—

JOSEPH E. SEAGRAM & SONS, INC.

Defendant.

ORDER

This matter having come before the Court for trial on May 30 and 31, 1995; and the Court having considered the deposition testimony of Dr. Carl Bluhm and Dr. Richard Bronsky, who were unavailable to testify at trial, and all of the admissible evidence presented at trial; and the Court being otherwise sufficiently advised;

IT IS ORDERED that JUDGMENT be entered in favor of the Defendant and against the Plaintiff, and this case is DISMISSED with prejudice.

This is a final and appealable order.
This the 26th day of June, 1995.

/s/ THOMAS B. RUSSELL
Judge, U.S. District Court

CC: Counsel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. C-87-0022-L(M)

JAMES W. COLEMAN,

Plaintiff,

—against—

JOSEPH E. SEAGRAM & SONS, INC.,

Defendant.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

AFFIDAVIT

ANN M. GIAMBUSSO, being duly sworn, deposes and says:

1. I am Human Resources Counsel for Joseph E. Seagram & Sons, Inc. ("Company" or "Seagram"), defendant in the above-referenced action. I am fully familiar with the facts herein. I submit this affidavit in opposition to Plaintiff's Motions (i) for Ruling on Omissions, (ii) for Ruling on Plaintiff's Motions Being Held In Abeyance Pending Defendant's Compliance With Order, and (iii) for Sanctions for Defendant's Refusal to Comply With Discovery Orders.

2. Since the commencement of this action in 1987, I have been the Seagram in-house attorney coordinating Seagram's defense of this action. In that capacity, I am responsible for, *inter alia*, supervising Seagram's response to discovery requests, including gathering relevant documents and verifying Answers to Interrogatories and Admissions.

3. Because Plaintiff has repeatedly accused Seagram of "withholding" documents, I have, on at least four separate occasions, directed Seagram employees to search Company files for additional documents relating to Plaintiff's employment and responsive to Plaintiff's discovery requests concerning other current and former Company employees. I have specifically directed that searches be made in Seagram's New York offices where the official Company Personnel Files of current employees and retirees (such as Plaintiff) are maintained, Seagram's off-premises records storage site at Glendale, New York and at Seagram's offices in Louisville and Cox's Creek, Kentucky and Lawrenceberg, Kentucky, where some files from the Louisville Research and Development facility at which Plaintiff was employed prior to the relocation of that department to White Plains, New York are located. Based on these searches, as more specifically described below, Seagram has produced (i) all documents relating to Plaintiff's job performance, (ii) all files maintained by Dr. Bluhm on the employees set forth in Plaintiff's September 6, 1989 letter, and (iii) all personnel files requested by Plaintiff on other current and former Seagram employees which are within Seagram's possession, custody or control. The Company has also previously produced documents and forms describing its policies and procedures concerning performance evaluations and merit reviews in effect during Plaintiff's employment with the Company which are responsive to Plaintiff's discovery requests forming the basis for Demand No. 6 in Plaintiff's Second Motion to Compel and the instant Motion for Ruling on Omissions.

4. When, in June of 1988, Plaintiff served his First Set of Interrogatories and Request for Production of Documents

which sought, *inter alia*, his personnel file and files maintained by Seagram's "supervisor/managerial employees . . . regarding the plaintiff", I directed that Seagram employees gather all such files relating to the employment of Plaintiff. Files were retrieved from Seagram's Human Resources Record Room, in which the official Company Personnel File is maintained, the Payroll Office, Seagram's New York Human Resources Department and Seagram's Research and Development Department in which Plaintiff had been employed prior to its move to White Plains, New York. All documents maintained within these various departmental files, as well as Plaintiff's official Company Personnel File, were gathered and forwarded in their entirety to Defendant's counsel Simpson Thacher & Bartlett, which already had a pre-existing file containing most of those documents that had been collected during its investigation (in which I was also involved) of a Complaint filed by Plaintiff in 1985 with the Equal Employment Opportunity Commission ("EEOC") and dismissed by that agency in 1986.

5. Seagram produced all of the documents contained in these files to Plaintiff on or about July 8, 1988, with the exception of an early draft of a response prepared by Simpson Thacher & Bartlett to Plaintiff's initial Complaint to the EEOC and correspondence and memoranda regarding that matter, which are withheld as privileged documents.

6. When, in August 1989, Plaintiff improperly served subpoenas *duces tecum* on two of the Company's employees (Dr. Leslie Bluhm and Mr. Robert Cherundolo), I directed that documents and forms describing the Company's policies and procedures concerning employee evaluations and merit reviews in effect during plaintiff's employment be gathered by Company employees. Approximately forty documents responsive to that request were gathered and forwarded to Simpson Thacher & Bartlett and subsequently produced to Plaintiff.

7. In addition to those documents and forms, Seagram had already produced in response to Plaintiff's First Request for

Documents a manual entitled "Personnel Procedure - Production Division" that had been used by the Company in the 1960's and 1970's. This manual contained some of the policies, rules and regulations applicable to Plaintiff during that period, but was not in effect after 1983. As was explained to Plaintiff's counsel in Seagram's Opposition to Plaintiff's Second Motion to Compel, since 1983 Seagram has not had any personnel manual or other comprehensive document setting forth employment practices or policies. Subsequently, in response to Plaintiff's Second Set of Interrogatories and Request for Documents, Seagram produced to Plaintiff a Seagram publication entitled "Your Guide to Seagram Benefits" which describes the benefits Plaintiff may have been entitled o during his employment.

8. When, by letter dated September 6, 1989, Plaintiff's counsel requested "the personnel files and/or merit review forms that Mr. Bluhm kept . . ." on certain named employees, I directed Dr. Bluhm to gather any of his personal supervisory files (which are not official Company files) regarding the employees set forth in Plaintiff's counsel's letter dated September 6, 1989. Dr. Bluhm advised me that while he had files on such employees containing documents dated after the move of the Louisville Research and Development Department to White Plains, he believed that his personal files on other employees which he maintained in Louisville prior to the move had been sent to Seagram's Human Resources Department in New York City and were no longer in his possession.

9. I gathered the files that were in Dr. Bluhm's possession and sent them to Simpson Thacher & Bartlett to prepare for production to the Plaintiff. I then directed Seagram employees to search for the files Dr. Bluhm believed he had sent to the New York Human Resources Department. The search for these files included Seagram's New York offices, including the Human Resources Department,[1] Seagram's off-site

[1] There were, of course, official Company Personnel Files for the employees and former employees included in Plaintiff's counsel's letter

storage facility at Glendale, New York, as well as Seagram's offices in Louisville and Cox's Creek, Kentucky. I am not aware of any other locations where these files might have been retained. The above-described search did not locate the files personally maintained by Dr. Bluhm prior to the relocation of the Research and Development Department to White Plains, New York. Seagram subsequently produced to Plaintiff the contents of the files on the listed employees maintained by Dr. Bluhm that were in his possession in White Plains as of the date of Plaintiff's request.

10. When, in April of 1991, Plaintiff served his Second Set of Interrogatories and Request for Production of Documents which sought, *inter alia*, the production of the personnel files of numerous past and present Seagram employees, I directed that Company employees gather the personnel files of the employees listed by Plaintiff in Request Nos. 1 and 2. Files were then retrieved from Seagram's Human Resources Records Room in New York, in which the official Company Personnel Files are maintained, the Payroll Office, Seagram's New York Human Resources Department and Seagram's Research and Development Department. All documents maintained within these various departmental files were gathered and forwarded to defendant's counsel, Simpson Thacher & Bartlett. The requested documents were produced to Plaintiff on or about June 18, 1991.

11. In response to Plaintiff's 66 Requests for Admissions asking, *inter alia*, Seagram to admit that it never had in its possession various personnel records of both an official and unofficial nature pertaining to Plaintiff and other employees at the Louisville Research and Development facility, I again directed that a thorough review be conducted of Company records in recognition of Seagram's obligation to respond to admission requests only after completing a reasonable inquiry into such requests. I directed Company employees to gather

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of September 6, 1989 maintained in Seagram's Human Resources Record Room in New York City, but they were not requested by Plaintiff at this time. (*See* Ohlweiler Affidavit, ¶ 22; Letter to Plaintiff's counsel dated April 6, 1993.)

responsive documents from Seagram's Human Resources Record Room, in which the official Company Personnel Files are maintained, Seagram's New York Human Resources Department and Seagram's Research and Development Department. A list of files maintained at the Human Resources Department at Seagram's Lawrenceberg, Kentucky facility concerning the Louisville Research and Development Department was also reviewed.

12. I also directed that all of Dr. Bluhm's own files be retrieved from Company off-site records storage facility at Glendale, New York and again reviewed to determine whether they contained any additional unofficial personnel records responsive to Plaintiff's request contained in his counsel's letter of September 6, 1989.[2] As was the case with the Company's original search of these files, no additional documents responsive to Plaintiff's discovery requests were found in these files.

13. Seagram completed the above-described search and review not only in response to Plaintiff's Requests for Admissions, but also in connection with Plaintiff's Second Motion to Compel which was served in January of 1993.[3] I reviewed outside counsel's planned response to the Second Motion to Compel in the context of my own review of Company files and found that all documents in Seagram's current possession, custody and control responsive to Plaintiff's discovery requests that formed the basis of his Second Motion to Compel had been produced to Plaintiff.

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[2] Dr. Bluhm had retired from Seagram by the time the Company received Plaintiff's Requests for Admission. Dr. Bluhm's personal files were as of this date comprised of work-related material completed by Dr. Bluhm during his tenure as Manager of the Research and Development Department in White Plains, *i.e.*, they contained no pre-relocation employee evaluations or other personal documents responsive to Plaintiff's discovery requests.

[3] Demand Nos. 2, 4 and 6 of Plaintiff's Second Motion to Compel form the substance of the instant Motion For Ruling On Omissions.

14. Specifically, in response to Demand No. 2 of Plaintiff's Second Motion to Compel, I verified that Seagram has no "performance summary" forms and "supervisor's notes", which are not official Company documents, for Doctors Gieger and Hirt as those terms have been defined in the context of this proceeding. In fact, Plaintiff has never requested the production of the official Company Personnel Files for either of these individuals. (*See* Ohlweiler Affidavit, ¶23 and footnote 8.)

15. I verified that Seagram has already produced to Plaintiff all of the personnel files within Seagram's possession and control that would contain performance evaluations on individuals identified in Demand No. 4 of Plaintiff's Second Motion to Compel.

16. Finally, with respect to Demand No. 6 of Plaintiff's Second Motion to Compel, I verified that, as was explained to Plaintiff in Seagram's responses to both Plaintiff's First and Second Request for Documents, since 1983 Seagram has not had any personnel manual or other comprehensive document setting forth Company employment policies or practices responsive to Plaintiff's request. As such, it is the Company's belief that it has complied in a fully responsive manner with respect to Plaintiff's requests which complies the basis of Demand No. 6. (*See* ¶¶6-7, *supra*)

17. When, on June 11, 1993, the Court ordered Seagram "to produce for inspection within (30) days of the date of entry of this order at the offices of its local counsel . . . the 'personnel records' of the following former or current employees of the defendant : [Ruf], Bailey, Wagener, Maisch, Weber, Bronsky, Wolfram, Baldwin, Coffey, Panek, Scalf, Sanders, Bosworth, Wathen, Luther and Wang," I directed that another search of Seagram facilities be completed similar to the search described in the preceding Paragraphs 10 through 12. I directed that the original Company Personnel Files, and any unofficial personnel-related material located with respect to the named individuals, be gathered and forwarded to Defendant's counsel, Simpson Thacher & Bartlett, even

though the content of these files had for the most part already been produced to the Plaintiff.[4] The original documents were produced for Plaintiff's review and copying in Louisville on July 9, 1993.

18. Seagram is not now, nor has it ever, wilfully concealed from Plaintiff any Company document responsive to any of his requests for documents which form the basis of the Motions currently pending before the Court herein. Rather, at substantial expense to the Company, I have directed on no less than four (4) separate occasions that searches be conducted at Seagram facilities either known, or believed to be reasonably likely to contain the employee records sought by Plaintiff throughout this proceeding. On each occasion, I forwarded all responsive material yielded by the respective searches to Seagram's counsel, Simpson Thacher & Bartlett, which in turn produced the material to Plaintiff. As such, Plaintiff's own belief, unsubstantiated in fact, that Seagram possesses additional discoverable material simply is untrue.

19. Seagram has produced (i) all documents relating to Plaintiff's job performance, (ii) all files maintained by Dr. Bluhm on the employees set forth in Plaintiff's September 6, 1989 letter, and (iii) all personnel files requested by Plaintiff on other current and former Seagram employees in Plaintiff's Second Set of Interrogatories and Request for Production which are within the possession, custody or control of the Company. Further, Seagram has complied in a fully responsive manner to Plaintiff's Production Request No. 12 of his Second Set of Interrogatories and Request for Production relating to copies of defendant's generally applicable personnel practices and procedures.

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[4] The only documents contained in those files not previously produced to Plaintiff were documents placed in the files after they had been produced and which pertained primarily to benefits.

/s/ ANN M. GIAMBUSSO
Ann M. Giambusso

Sworn to before me this
15th day of September, 1993.

/s/ KAREN E. MOLONEY
Notary Public

(3)

Supreme Court, U.S.
FILED
APR 15 1997
OFFICE OF THE CLERK

No. 96-1407

In The

Supreme Court of the Unites States

October Term, 1996

James W. Coleman, Ph.D.
Petitioner

v.

Joseph E. Seagram & Sons, Inc.
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

JAMES W. COLEMAN
PETITIONER *PRO SE*
8622 BLACKPOOL DRIVE
LOUISVILLE, KY 40222
(502) 426-5815

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QUESTIONS PRESENTED

I. Whether the Respondent should be estopped from denying the existence of the court-ordered job-performance evaluations on Petitioner and Respondent's other employees.

II. Whether Respondent should be estopped from denying the existence of its personnel policy documents governing its employees after 1983.

III. Whether Respondent should be estopped from relying on the oral trial testimonies which were unsupported by documentary evidence and pertain to material facts.

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ARGUMENT

I. JUSTICE DEMANDS THAT ALL OF SEAGRAM'S DISCOVERY-RELATED ARGUMENTS BE BARRED UNDER THE DOCTRINES OF ESTOPPEL.

Based on the law of the Sixth Circuit, judicial estoppel precludes a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party and accepted by the court in a prior proceeding. *United States v. Stan D. Owens* 54 F.3d 271, 275 (6th Cir. 1995)(citing *Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214, 1217-18 (6th Cir. 1990). *See* also *Edwards v. Aetna Life Insurance Co.* 690 F.2d 595, 598-99 (6th Cir. 1982). That same legal principle should apply here.

As shown herein regarding the production of the **court-ordered** documents, Seagram now takes a contrary position (Res. at 9-12). In deposition, Dr. Weber stated that he completed the "Blue Books" in their entirety on all of his subordinates, including me. R.49: Weber's depo. October 10, 1991, pp. 55, 60-61. By way of affidavit, Dr. Weber made corrections in his deposition transcript but this portion of his testimony remained unchanged. R.52: Weber's aff. with corrections. Seagram misstates the trial testimony of Dr. Frederick Weber when counsel states:

> "...that [Dr. Weber] did not fill out the sections of the '"Blue Book"' concerning promotability for [me] or for any other employees,

> and that [Dr. Weber] usually did not fill out a complete "Blue Book" on anybody while he was Section Head (Res. at 10).

Contrary to Seagram's assertion, when read in full context on this particular fact, Dr. Weber did not recant his deposition testimony at trial. R.179: Trial Transcript of May 31, 1995, pp. 69, 70. Furthermore, a "Blue Book" (on one of Dr. Weber's subordinates not covered under the **court Order)**, with all eight pages completed in Dr. Weber's own handwriting was introduced at trial. *Id.* at 70 (Plaintiff Exh. 8-1 through 8-8).

Further, on page 8 which Seagram selectively took from one of my "Blue Books" is a handwritten notation by Dr. Weber that reads: "Update of original sent to N.Y. prior to 5/15/84 update" (Plaintiff Exh. 7-4) -- meaning that my "Blue Book" had been sent to Seagram's corporate headquarters in New York City to be retained as a permanent record pursuant to Seagram's written instructions. In deposition, Dr. Weber also testified that one of my "Blue Books" which he prepared in 1984 was modified in negative ways by his immediate supervisor, Dr. Leslie Bluhm, Seagram's decision-maker. R.55: Weber's depo. October 1, 1991, pp. 200-05.

At trial by way of deposition, Dr. Bluhm testified that in 1984, he concluded that, based on the contents of my "Blue Books," I was not capable of being promoted to the Section Head position at issue. R.132: Bluhm's depo. May 10-11, 1989, p. 150; R.130: Bluhm's depo. September 12, 1989, pp. 92-95. Seagram has

never relinquished these particular "Blue Books" which were relied on by Dr. Bluhm nor any other "Blue Books" on me. Clearly, the testimonies of Drs. Weber and Bluhm are inconsistent with Seagram's current position before this Court.

Further, in shifting its position, Seagram states in essence that it could not obey the **discovery Order** substantively because the "Blue Books" on Seagram's Caucasian employees also may not have ever existed due to Dr. Weber's alleged lackadaisical attitude toward completing "Blue Books" (Res. at 10). Even if that supposition were true, the undisputed fact is that Dr. Weber was never the supervisor of all the Caucasian employees covered in that **Order**, namely: Dr. Weber himself, Bronsky, Baldwin, Coffey, Panek, Sanders, Bosworth, Wathen or Luther. Further, Dr. Weber was not always the supervisor of Ruf, Scalf and myself. In addition, that **Order** was not limited just to the production of "Blue Books" (or the earlier equivalent) (Pet. App A-4, p. 6).

In an attempt to justify its new position, Seagram relies heavily of the fact that the Sixth Circuit stated that "Seagram produced 3000 pages of employment records of [me] and other employees" (Res. at 7-8). However, Seagram failed to point out to this Court that those are the selfsame "3000 pages" that the magistrate judge acknowledged (in his June 11, 1993 **discovery Order)** that already had been produced (Pet. App. A-4, p. 4). Obviously, the "3000 pages" did not include any of the job-performance evaluations

covered under the **discovery Order** entered on November 30, 1990, February 3, 1993 or June 11, 1993 (Pet. App. A-2; A-3; and A-4, respectively).

In addition, Seagram records custodian, Mr. Robert Cherundolo, asserted under oath to the district court that no job-performance evaluations had been destroyed (Pet. at 12). In addition, Mr. Cherundolo swore under oath to that court that those job-performance evaluations ("Blue Books") were stored in "a series of locked drawers" at Seagram's corporate headquarters in New York City, and that he knows of no instance when "Blue Books" could not be found. R.129: Cherundolo's depo. September 13, 1989. pp. 69, 86, 101-03, 127. Seagram, by and through its counsel, Mr. John W. Ohlweiler, Esq. (also counsel of record for the instant petition), offered a stipulation of confidentiality (annexed with R.76: my motion to compel) as a precondition for the release of these selfsame documents. Counsel for the parties signed a negotiated stipulation of confidentiality for this purpose (Pet. App. A-3, p. 7). The magistrate judge accepted Mr. Cherundolo's sworn testimony, and the signed stipulation as facts (Pet. at 12).

When it was before the Sixth Circuit, Seagram supported its appellate Brief by advancing only the selected language from the sworn affidavits of Mr. Ohlweiler and Ms. Ann Giambusso, Esq. and stated unequivocally that Seagram produced "all of the documents covered by [my] Motions To Compel...." Obviously designed to achieve Seagram's desired results, Ms. Giambusso's affida-

vit unequivocally stated that: "The requested documents were produced to [me] on or about June 18, 1991" (Res. A-22, para. 10). She further and unequivocally swore that: "The original documents were produced for [my] review and copying in Louisville [Kentucky] on July 9, 1993 (Res. A-24-25, para. 17). Mr. Ohlweiler's sworn affidavit referenced to the Sixth Circuit stated essentially the same thing (annexed at R.112: Seagram's response to motion for sanctions). At the inspection, I personally examined all the file jackets which were presented (some of which were completely empty). As set forth in my sworn affidavit annexed to my motion for sanctions against Seagram for noncompliance, Seagram did not produce any of the **court-ordered** documents which were covered under the 1965-1985 time frame, i.e., neither originals nor copies. R.103.

Over one year after the district court had denied my motion for sanctions for noncompliance, Ms. Carol Smith, then Seagram's records custodian, came forward on May 8, 1995 with her sworn affidavit[1] which in essence expressly verified that both Ms. Giambusso and Mr. Ohlweiler had indeed made misstatements to the district court (and hence the Sixth Circuit) in connection with my motion for sanctions.

Purposely relying on the misstatements in the affidavits of both Ms. Giambusso and Mr. Ohlweiler, Seagram

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[1] Ms. Smith's affidavit did not find its way into the record. It is offered here so that this Court may take judicial notice.

successfully persuaded the Sixth Circuit to reach the clearly erroneous conclusion that: "The district court ultimately determined that Seagram had complied fully with [my] discovery requests (Pet. App A-6, p. 2). The Sixth Circuit obviously accepted Seagram's selected language from the affidavits of Ms. Giambusso and Mr. Ohlweiler as being the whole truth of the matter, *supra*.

Unlike its position asserted to the Sixth Circuit based upon the affidavits of Ms. Giambusso and Mr. Ohlweiler, Seagram comes now before this Court with a position which is clearly contrary to the sworn testimonies of Dr. Weber, Dr. Bluhm and Mr. Cherundolo and the import of the signed stipulation, *supra*. Put simply, Seagram now asserts to this Court that it cannot be compelled to produce "what it did not have" (Res. at 11-12).

Seagram is incorrect when it states as fact "that the District Court did not limit [my] scope of discovery, nor did Seagram request such a limitation (Res. at 8)." Not in words but in actual practical terms, the lower courts effectively limited the "scope of discovery" by not enforcing the **discovery Orders**. The "scope of discovery" in the department where I worked was primarily limited to cover only those Seagram employees who were 3 to 11 pay grades below me. Even then, the production on those employees was relatively scant or nonexistent.

Finally, in a prior ruling, this Court stated that it makes little sense to address the merits of a case until

the record is complete regarding discovery. *Wayte v. United States*, 470 U.S. 598, 623 (1985)(Marshall,J., dissenting). Seagram asserted that I was "unable to dispute the District Court's findings of fact and conclusions of law..." (Res. at 2). I agree with the wisdom of the *Wayte* Court.

I will turn now to Seagram's point about the alleged nonexistence of its personnel policy document in effect after 1983 (Res. at 10-11). In contract law, it is well established that a party is estopped from denying the existence of a binding contract where he has done something intending that the other party rely on it and such reliance is detrimental to that party. In an employer-employee relationship, the personnel policy document is the 'contract' between the parties based on common sense law. Invariably, such policy document is offered by the employer, and is relied upon by the employees. There is nothing in the record which suggests or implies that the same situation did not exist in the present case. Seagram asserts that its personnel policy document in effect after 1983 cannot be found (Res. at 11). 'Cannot be found' is the functional equivalent of nonexistence. The offering party (Seagram) should be estopped from denying the existence of the 'contract'.

Concerning Seagram's contention that it would be "unduly and unfairly prejudiced" if my amended complaint regarding intangible injuries were filed of record, the doctrine of estoppel also applies here (Res. 14). On this sub-

ject, Seagram successfully argued that the memories of its potential witnesses were "nongreen" and had faded with the passage of time. The magistrate judge accepted Seagram arguments and denied motion to amend (Res. at 14). My motion in 1992 to amend was filed more than five years after the commencement of the instant lawsuit in 1987 (Res. at 12). Because of Seagram's recalcitrance regarding discovery, *supra*, I did not get to trial until 1995 -- more than 10 years after the date of the last incident. At trial, Seagram succeeded in persuading the district court to give "great weight" to the oral testimonies of Dr. Weber and Mr. James Martin (Res. at 4-6) whose memories by Seagram's own admission had faded with the passage of time, *supra*.

Clearly, Seagram's great reliance on oral testimonies, unsupported by documentary evidence, at trial and now is contrary to its prior position about "nongreen" memories. Therefore, application of the doctrine of estoppel should be invoked here to preserve the integrity of the judicial process. *Edwards* 690 F.2d at 599.

II. SEAGRAM FAILED TO CITE A PUBLISHED AUTHORITY ON POINT TO SUPPORT THE DECISION OF THE LOWER COURTS IN NOT ENFORCING THE DISCOVERY ORDERS.

Seagram cites *Wayte v. United States*, 470 U.S. 598, 624-25 (1985)(Marshall, J., dissenting); *Harris v. Chipman*, 97 F.3d 499, 506 (11th Cir. 1996); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 929 (4th Cir. 1995); *Herring v.*

Delta Air Lines, Inc., 894 F.2d 1020, 1021 (9th Cir. 1989), *cert. denied, 494* U.S. 1016 (1990); *Plott v. General Motors Corp., Packard Elec. Div.*, 71 F.3d 1190 (6th Cir. 1995), *cert. denied,* 116 S. Ct.1546 (1996), in connection with the instant discovery question (Res. at 8).

Unlike the instant petition on the question of nonenforcement of the **discovery Orders**, all the cases cited by Seagram pertain to discovery matters such as: (i) making appropriate arguments to entitlement to discovery; (ii) vacating sanctions after the defendant finally obeyed the discovery order; or (iii) denying of untimely motions to compel. Therefore, neither of those cases is on point. Finally, Seagram's reliance on the *Plott* decision is clearly misplaced because the phrase "discovery orders" is never mentioned or implied in the *Plott* decision (Res. at 8).

Seagram's argument that all my claims are mooted is legally flawed because of the discovery problems, *supra* (Res. at 12-14).

Regarding my assertion that the court's nonenforcement of its discovery Orders is of exceptional public interest in the civil-rights community, Seagram has never denied having possession of these letters nor that they were sent to the court (Res. at 12, fn. 10).

CONCLUSION

In the interest of justice, it is submitted that for all the foregoing reasons Seagram be estopped as set forth herein.

Respectfully submitted,

JAMES W. COLEMAN
Petitioner *Pro Se*
8622 Blackpool Drive
Louisville, KY 40222-5667
(502) 426-5815

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES W. COLEMAN,	)	
	)	
Plaintiff,	)	AFFIDAVIT
	)	Civil Action
- against -	)	No. C-87-0022-
	)	L(M)
	)	
JOSEPH E. SEAGRAM & SONS, INC.,	)	
	)	
	)	
Defendant.	)	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CAROL SMITH, being duly sworn, deposes and says:

1. I am an employee of Joseph E. Seagram & Sons, Inc. ("Seagram" or the "Company"), the defendant in the above-captioned action, located at 800 Third Avenue, New York, New York 1002, assigned as the Custodian of Personnel Records. I am fully familiar with the facts set forth herein.

2. On May 3, 1995 through May 4, 1995, I conducted and caused others under my supervision to conduct a search of the

personnel and other records of Seagram in an effort to find the documents responsive to Request # 1, paragraph 4, of the July 15, 1991 letter of William H. Allison, counsel for James Coleman ("Plaintiff"), sent in response to Seagram Responses and Objections to Plaintiff's Second Set of Interrogatories and Request for the Production of Documents.

3. The personnel files requested by Plaintiff did not contain the specific "Merit Review Ratings, Performance Reviews, Managerial Personnel Appraisal[s], Performance Evaluation[s] for Supervisory, Administrative, and Professional Employees, Performance Evaluation[s] for Non-Exempt Employees, the three types of Performance Summary forms, Supervisor's Notes, Employee Personnel Records used to initiate salary increases, and pp. 7 and 8 of the 'blue books'" enumerated by Plaintiff, with the exception of the following, all of which were previously produced to Plaintiff:

a. E.W. Ruf

Employee Personnel Records dated 4/24/74, 7/24.75, 11/1/76 and 11/2/77; and

Documents showing salary and job title history pre-Employee Personnel Records include:

(i) Salary Change date 11/16/71;
(ii) Notices of Payroll Change dated 12/3/41, 3/3/42, 5/18/42, 6/17/42. 6/26/42, 7/29/42, 8/27/42. 1/22/43, 9/30/43, 1/9/44, 4/28/44, 9/19/44, 11/12/45, 12/4/45, 6/28/46, 1/8/47 and 1/1/58;

(iii) Transfers dated 8/8/40 and 1/2/53;

(iv) Inter-Office Correspondence dated 9/29/39 and 12/27/43;

(v) Salary Increases dated 10/11/40; and

(vi) Letters to Mr. Ruf from F.W. Klayer dated 8/20/40 and 10/4/40.

b. Joan D. Wathen

Employee Personnel Record dated 2/4/80.

c. Jose Puebla

Employee Personnel Record dated 3/6/86; and "Blue Book" dated 2/14/90.

d. Hugh Mason

Employee Personnel Records dated 1/7/80, 2/1/80, 5/584, 11/1/84 and 9/5/85;

Managerial Personnel Appraisals dated 8/1/71, 3/29/74, 4/22/74 and 12/31/74;

Performance Reviews dated 7/12/71, 7/1/72, 7/9/73, 6/6/78 and 6/6/79 and one undated Performance Reviews; Performance Evaluation for Supervisory, Administrative, and Professional Employees dated 2/1/70; and

Performance Summary dated 6/13/80.

e. Fred Weber

Employee Personnel Records dated 2/4/80 and 11/8/84.

f. Willis V. Lord

Employee Personnel Records dated 7/24/75. 1/7/80, 5/1/80. 8/7/85, 8/1/77 and 8/7/84;

Performance Reviews dated 11/18.71, 7/16/72 and 7/9/73;

Performance Evaluation for Supervisory, Administrative, and Professional Employees dated 2/13/69; and

Performance Evaluation for Non-Exempt Employees dated 1/25/68.

g. Sidney Baldwin

Employee Personnel Records dated 8/7/84 and 8/7/85.

h. Frank Luther

Performance Evaluation for Supervisory, Administrative, and Professional Employees dated 5/24/60; and

Employee Personnel Records dated 4/21/75, 4/28/76, 5/2/77, 1/7/80, 5/1/80. 5/582 and 6/15/83.

i. Robert Frowenfeld

Managerial Personnel Appraisals dated 8/1/74 and 1/5/76.

j. David Redmon

Employee Personnel Records dated 1/7/80 and 11/8/84.

k. Tim Moder

"Blue Book" dated 5/24/84.

4. Dr. James Coleman's personnel file contains the following documents, all of which were produced to Plaintiff:

Merit Review Ratings dated 1/15/82, 1/19/83, 4/9/84 and 4/9/85;

"Blue Book pages 7-8 dated 5/15/84 and one set of undated "Blue book" pages 7-8;

Performance Summaries dated 6/12/80, 8/15/80, 5/5/81, 5/20.81, 1/23/82, 6/18/82, 6/24/82, 1/10/83, 1/12/83 and 1/10/84;

Performance Reviews dated 11/76 and 2/9/77 and one undated Performance Review;

Managerial personnel Appraisal dated 8/1/73;

Performance Evaluation for Supervisory, Administrative, and Professional Employees dated 11/29/65 and 2/10/67;

Performance Evaluation for Non-Exempt Employees dated 2/19/65; and

Employee Personnel Records dated 8/4/76, 1/7/80, 2/2/81, 2/4/82 and 5/6/85 and four Employee personnel Records for which the date is illegible.

"/s/ Carol Smith"

Carol Smith

Sworn to before me this
8 day of May, 1995.
"/s/ Antoinette Pisana"
Notary Public

Antoinette Pisana
Notary Public, State of New York
No. 24-4866080
Qualified in Kings County
Certificate filed in New York County
Commission Expires July 28, 1996